TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 468

ROBERT M. LEACH, EXECUTOR, ETC.,
PETITIONER,

vs.

MALCOLM E. NICHOLS, FORMERLY COLLECTOR
OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1931

CERTIORARI GRANTED DECEMBER 7, 1931

(36,282)

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1930.

No. 2554.

MALCOLM E. NICHOLS,
FORMERLY COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, APPELLANT,
v.
ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 2700, LAW DOCKET.

ROBERT M. LEACH, EXECUTOR OF THE ESTATE OF WILLIAM E. WALKER, PLAINTIFF,
v.
MALCOLM E. NICHOLS, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

[MEMORANDUM. This cause was heretofore appealed by Robert M. Leach, plaintiff, to the United States Circuit Court of Appeals for the First Circuit, from a judgment entered in this court June 9, 1927, and an appeal record was duly certified by the clerk of the United States District Court and entered in the said Circuit Court of Appeals at the October Term, 1927, and entitled, "No. 2144, Robert M. Leach, Executor, Plaintiff, Plaintiff in Error, *v.* Malcolm E. Nichols, Collector of Internal Revenue, Defendant, Defendant in Error," to which record reference is hereby made in lieu of an actual incorporation herein. JAMES S. ALLEN, *Clerk.*]

The Mandate of the United States Circuit Court of Appeals for the First Circuit, reversing the judgment of this District Court, was received and filed in the clerk's office on the sixteenth day of January, A. D. 1928, and the same being understood by the court, it was ordered that the same be entered of record and was duly entered at the December Term of this court, A. D. 1927, and is in the words and figures following:

MANDATE.

[Filed January 16, 1926.]

UNITED STATES OF AMERICA, ss.

[L. S.] THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judge of the District Court of the United States for the District of Massachusetts,

GREETING:

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, 2700, Law Docket. Robert M. Leach, Executor of the Estate of William E. Walker, Plaintiff, *v.* Malcolm E. Nichols, former Collector of Internal Revenue, Defendant, on June 9, 1927, the following Judgment was entered:

JUDGMENT.

(June 9, 1927.)

Thereupon, to wit, June 9, 1927, it is considered by the court that the said Robert M. Leach, executor of the estate of William E. Walker, deceased, plaintiff, take nothing by his said writ, and that the said Malcolm E. Nichols, former Collector of Internal Revenue for the Third District of Massachusetts, defendant, recover of said plaintiff his costs of suit taxed at

as by inspection of the transcript of the record in said cause of the said District Court which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of writ of error sued out by Robert M. Leach, Executor, plain-

tiff, agreeably to the act of Congress, in such cases made and provided, fully and at large appears,

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-seven, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now, to wit, December 27, 1927, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further action not inconsistent with the opinion passed down this day; the plaintiff in error recovers costs in this court.

Costs in this United States Circuit Court of Appeals for the First Circuit to be satisfied under the direction of said District Court in favor of said Robert M. Leach, executor, plaintiff, plaintiff in error, and against said Malcolm E. Nichols, Collector of Internal Revenue, defendant, defendant in error, are taxed at one hundred fifty dollars and five cents ($150.05).

A certified copy of the opinion of the court accompanies this mandate.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the aforesaid judgment and opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable W. H. TAFT, Chief Justice of the United States, the fourteenth day of January, in the year of our Lord one thousand nine hundred and twenty-eight.

ARTHUR I. CHARRON,
Clerk of the United States Circuit Court of Appeals
for the First Circuit.

Costs of plaintiff in error:

Clerk	$39.00
Transcript (D. C.)	78.05
Printing record	13.00
Attorney	20.00
	$150.05

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 2144. Robert M. Leach, Executor, *v.* Malcolm E. Nichols, Collector.

Bill of Costs.

Clerk's fees:

Docketing case	$5.00
Filing 24 printed copies of record	6.00
Appearances 3 at 25c.; filing 25c.	1.00
Printing fees	1.75
Continuance	.25
Calendar	1.00
Assignment 20c.; hearing 20c.	.40
Filing brief and receipts	5.50
Entering decree $1; filing 25c.; recording 20c.	1.45
Copy opinion to file, $3.80; filing 25c.	4.05
Filing motion for mandate 25c.; order 20c.; filing 25c	.70
Mandate $5; copy to file $1; filing 25c.	6.25
Filing bill of costs 25c.; copy 20c.	.45
Certified copy of opinion for mandate	5.00
Minuting issuing of mandate	.20
Clerk's fees including mandate	39.00
Printing (C. C. A.)	13.00

Transcript and printing (D. C.)	78.05
Attorney docket fee	20.00
	$150.05

[On back:]

2700 Law No. 2144.

United States Circuit Court of Appeals for the First Circuit.

October Term, 1927.

Robert M. Leach, Executor, Plaintiff in Error,

v.

Malcolm E. Nichols, Collector of Internal Revenue,

Defendant, Defendant in Error.

Mandate January 14, 1928.

[Filed Jan 16 1928].

CERTIFIED COPY OF OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

DECEMBER 27, 1927

(ACCOMPANYING MANDATE.)

JOHNSON, Circuit Judge. This is an action brought by the plaintiff in error as executor of the estate of William E. Walker, deceased, against Malcolm E. Nichols, as the Collector of Internal Revenue, to recover the sum of $49,634.73 assessed and collected as estate taxes due upon said estate under provisions of the Revenue Act of 1916 as amended and reenacted October 3, 1917. The case is here upon a writ of error from a judgment of the District Court of Massachusetts.

This sole question presented is whether the court was right in holding that the plaintiff, as executor of said estate, had entered into a valid and binding compromise agreement whereby he was estopped from maintaining this action.

William E. Walker, late of Taunton, Massachusetts, died November 9, 1918, testate. The plaintiff was appointed executor December 6, 1918, and on or about May 8, 1919, filed the return required by law and paid an estate tax of $37,700.-

68 assessed according to said return. Later he received a notice from the Commissioner of Internal Revenue that an additional tax would be claimed and assessed, and paid $50,000 before receipt of notice of the final determination of the tax. On March 18, 1922, the Commissioner made a final decision that the total tax due from said estate was $89,735.64. The executor then paid $2,034.96, being the balance of the tax due according to the assessment made by the Government, and interest amounting to $3,988.44.

The difference between the amount determined by the Government as the gross estate of which the testator died seized and possessed and that returned by the executor was occasioned almost entirely by the claim that transfers made by William E. Walker on or about November 13, 1917, and prior thereto amounting to $404,450.74, were gifts made in contemplation of death, of which the fact that they were made within two years of his death was prima facie evidence under the provisions of said Revenue Acts.

The errors assigned are the direction of a verdict for the defendant, and the admission and exclusion of evidence. Under the conclusion which we have reached, however, it is only necessary to consider the first, which raises the question of whether the alleged agreement entered into by the executor constituted a bar to the maintenance of this action.

On November 23, 1921, the plaintiff filed with the Internal Revenue agent at Boston what is denominated an "Estate Tax Deposition", in the first paragraph of which this statement appears:

> "1. That as the result of a hearing held in the office of the Internal Revenue Agent in Charge on the 23rd day of November, 1921, he, as executor of the above named estate, now agrees to and accepts as taxable property in the estate and at the values recommended all the certain contested items in the estate as indicated below, provided: (1) that no portion of the 1,000 shares

in the Magee Furnace Co., given by the decedent to to Robert M. Leach on November 30, 1917, be included in the gross estate, and (2) that all of the shares of stock of the Weir Stove Co. shown in this estate be valued at $1000 per share, which in his opinion is the full and fair value of said stock as of the date of the decedent's death."

This is followed by a statement of the taxable property of the estate and its value.

On November 30, 1917, the decedent had transferred to Robert M. Leach 1,000 shares of the Magee Furnace Company, and also 100 shares of the Weir Stove Company. In December, 1917 and January, 1918, he had transferred to Mary W. Leach, his daughter and the wife of Robert M. Leach, 285 shares of the Metropolitan Furniture Company, 49 shares of the Atherton Furniture Company, and a note of LeBaron Atherton for the sum of $12,000, with interest from January 4; and on January 21, 1918, he had transferred to his wife, Jennie E. Walker, 200 shares of the Weir Stove Company. All of the property covered by these transfers was claimed by the Government to constitute a part of the gross estate of the decedent.

In the alleged agreement signed by Robert M. Leach as executor he agreed that if the Magee Furnace Company stock were not held to be a part of the estate and to have been legally transferred, and if the Weir Stove Company stock should be valued at $1,000 per share, that the other property transferred by the decedent as above stated should be held to be a part of the estate of the decedent and subject to the estate tax; and also agreed that certain increases in the values upon real estate over those given in his return would be accepted by him.

This alleged agreement appears upon a form designated "Estate Tax Deposition", which, under Section 1305 of the

Revenue Act of 1918, was used for the purpose of ascertaining the correctness of the return which had been made by the executor. This section provides that the Internal Revenue Agent may take the testimony under oath of the person rendering a return with reference to an estate.

The third, and concluding, paragraph of this alleged agreement is as follows:

> "3. That he makes this affidavit, without prejudice, and waives all question of protest, except as above mentioned, in order to expedite or hasten as much as possible the final determination of the tax in this estate."

This was signed and sworn to by Robert M. Leach, as executor.

On March 18, 1922, after it was received, the Bureau of Internal Revenue passed upon the estate's abatement claim and reduced the tax assessment of which it had given notice by the amount of $27,724.20, and made the assessment of the tax in accordance with the alleged agreement of November 23, 1921, assessing the real estate at the values given therein, omitting from the gross estate the transfer made by the decedent to the plaintiff, and accepting the value of the stock of the Weir Stove Company placed upon it in the alleged agreement.

On June 26, 1925, the estate filed a claim for refund of $60,058.03 and interest.

There were several conferences between representatives of the estate and officers of the Bureau of Internal Revenue, and several letters passed between them after the filing of the alleged agreement. On February 3, 1922, Albert R. White, attorney for the executor, wrote to the Commissioner of Internal Revenue asking definite information as to the claims made by the Bureau so that the limit of the scope of inquiry might be limited. On February 10, 1922, the Commissioner replied to this letter, stating, in substance, that it

would be impossible to comply with his request until there had been a hearing as requested, which was to be held in Washington on February 14, 1922. And again, March 18, 1922, a letter from the Commissioner of Internal Revenue states, in substance, that although the claim for abatement was directed with reference to a number of items, all protests were waived at a conference held with representatives of the estate on February 14, 1922, except in regard to the value of certain real estate specified; that the evidence submitted on the part of the estate with the supplemental report of investigation from its Boston office supported the values of the real estate at which he had arrived, and that these fairly reflect its value at the date of the decedent's death. With reference to the stock of the Magee Furnace Company it stated that the contention that this was not transferred in contemplation of death but was purchased by the decedent as a gift for his son-in-law, Robert M. Leach, was supported by the evidence which had been submitted, and that this should be excluded from the decedent's gross estate; that the evidence on file with the Bureau had led it to fix the value of the Weir Stove Company stock at $1,000 per share as of the date of the decedent's death, which value was agreed upon by the representatives of the estate at the conferences mentioned. It further stated that the estate no longer protests the inclusion of this stock as a part of the decedent's gross estate. No reference is made in this letter to the alleged agreement of November 23, 1921, nor to any compromise agreement, but it clearly states that the gross estate and its value have been determined from evidence before the Bureau.

The claim for refund was filed by the estate on June 20, 1925, amounting to $49,634.74 and interest $10,423.39, alleging (1) that none of the gifts were made by the decedent in contemplation of death, and (2) that deduction should be made for the amount required to pay the Federal Estate Tax.

In it there was a request that an opportunity for an oral hearing in Washington be given, which was granted and August 26, 1925, fixed for this hearing.

On September 22, 1925, the Commissioner wrote to the executor as follows:

> "The Bureau's records show that at your request a conference was scheduled for this case at 11 A. M. August 26, 1925. No one representing the estate appeared for the conference. The Bureau is prepared to pass upon the refund claim. This letter is to notify you that unless the estate arranges for a final conference with the Bureau by October 15, 1925, it will be necessary to close the case in the light of all the evidence of record in the Bureau at that time."

In a letter of January 16, 1926, the Commissioner stated in substance, that the claim for refund had been examined, that "upon consideration of all the evidence before it, the Bureau is of the opinion that the value of the property transferred was properly included in the gross estate. . . . In view of the foregoing, your claim for refund of $60,058.03 is rejected in its entirety." The transfers here referred to were those to the wife of the executor and to Mrs. Walker and also the stock of the Weir Stove Company included in the transfer to Robert M. Leach.

It thus appears from the conferences subsequent to the date of the alleged agreement of November 23, 1921, and from the letters of the Commissioner of Internal Revenue, that the final determination of the Bureau was not reached because of this alleged agreement but from all the evidence obtained, including that furnished by it as a statement by the executor under oath. This agreement was not a compromise authorized by Section 3229 of the Revised Statutes, Comp. Stat., 1916, 5952, because it was not assented to by the Secretary of the Treasury as required by that section, and no other compromise is authorized by the Act.

No agreement by the executor not made in accordance with this section would relieve the Commissioner from the duty cast upon him of determining the value of the gross estate from all evidence obtainable, including that furnished by the representative of the estate.

The District Court erred in holding that the alleged agreement operated as a bar to the maintenance of this action, and it is unnecessary to consider the other assignments of error.

The judgment of the District Court is reversed, and the case remanded to that court for further action not inconsistent with this opinion; the plaintiff in error to recover costs in this court.

A true copy. [SEAL]

Attest: ARTHUR I. CHARRON, *Clerk.*

This cause was thence continued from term to term to the September Term A. D. 1928, when, to wit, September 28, 1928, the following Motion to Amend Declaration was filed by the plaintiff:

PLAINTIFF'S MOTION TO AMEND DECLARATION.

[Filed September 28, 1928.]

Now comes the plaintiff in the above-entitled action and moves that he be allowed to amend his declaration by substituting therefor the plaintiff's amended declaration attached hereto.

By his Attorney,

O. W. TAYLOR,

Attorney for Plaintiff.

[MEMORANDUM. Copy of plaintiff's amended declaration, referred to in the foregoing motion as annexed, is here omitted, but will be found hereafter of record on page 12 of this Transcript of Record. JAMES S. ALLEN, *Clerk.*]

At the same time, to wit, October 8, 1928, the aforementioned motion to amend declaration was allowed by the court and the following Plaintiff's Amended Declaration was filed:

PLAINTIFF'S AMENDED DECLARATION.

[Filed and Allowed October 8, 1929.]

COUNT I.

And the plaintiff says:

1. That the plaintiff, Robert M. Leach, is a citizen of the Commonwealth of Massachusetts, residing at Taunton in the County of Bristol, Massachusetts, within this District, and that under and by virtue of letters testamentary issued to him on the sixth day of December, 1918, by the Probate Court at Taunton in said County of Bristol, Massachusetts, the plaintiff was at all times thereafter, and now is, the duly qualified executor of the estate of William E. Walker, late of Taunton in said County of Bristol, Massachusetts, who died testate on the ninth day of November, 1918.

2. That the defendant is now residing in Boston in the County of Suffolk, Massachusetts, and was aforetime, to wit: from the first day of August, 1921 to the thirty-first day of August, 1925, the duly qualified United States Collector of Internal Revenue for the Third District of Massachusetts.

3. That this is an action arising under the laws of the United States of America, providing for Internal Revenue, brought by the plaintiff, as he is executor as aforesaid, under section 51 of the Judicial Code, against the defendant as he was Collector of Internal Revenue as aforesaid, to recover a portion of the federal estate tax and interest thereon, wrongfully and illegally assessed against the said testate's estate, and collected from the plaintiff by the defendant acting under instructions from the United States Commissioner of Internal Revenue, assuming to act under the Revenue Act of October, 1917, approved October 3, 1917 (40 Stat. 3000); under the circumstances and in the manner hereinafter specified.

4. That on or about the eighth day of May, 1919, the

plaintiff, as he was executor as aforesaid, did seasonably file with the Collector of Internal Revenue the federal estate tax return for the estate of the said William E. Walker, disclosing the entire gross estate of the said William E. Walker as of November 9, 1918, and thereupon did pay to the said Collector the sum of thirty-seven thousand, seven hundred and 68/100 dollars ($37,700.68), being the total tax disclosed on said return.

5. That on the twenty-first day of February, 1922, after notice had been given to the plaintiff by the defendant that a large additional tax would be assessed against the said estate, but before the said Commissioner had made his final decision as to the plaintiff's protest against the said proposed additional tax, the plaintiff, in order to avoid penalties, interest and distraint of the property of the estate, did pay to the defendant, as he was Collector of Internal Revenue as aforesaid, the additional sum of fifty thousand dollars ($50,000), as demanded and accepted by the defendant, as a partial payment of the proposed additional tax to be determined by the final decision of the said Commissioner of Internal Revenue.

6. That on the eighteenth day of March, 1922, the said Commissioner of Internal Revenue determined the total tax upon the said estate to be eighty-nine thousand, seven hundred thirty-five and 64/100 dollars ($89,735.64), as shown in column No. 1 of the plaintiff's amended bill of particulars attached hereto.

7. That on the twenty-fourth day of March, 1922, the defendant demanded of the plaintiff the balance of said total tax ($89,735.64) as determined by the said Commissioner, in the amount of two thousand, thirty-four and 96/100 dollars ($2,034.96), and interest in the amount of three thousand, nine hundred eighty-two and 44/100 dollars ($3,982.44), and the said sums in the total amount of six thousand, seventeen and 40/100 dollars ($6,017.40) were paid to the defendant by the plaintiff, in order to avoid penalties and distraint of

the property of the estate, on the twenty-seventh day of March, 1922.

8. That the said total tax upon the estate ($89,735.64), as determined by the said Commissioner on March 18, 1922, was excessive, erroneous, wrongful and illegal in the following respects:

(1) In determining the value of the gross estate of the decedent the said Commissioner erroneously included therein certain property of the value of four hundred four thousand, four hundred fifty and 64/100 dollars ($404,450.64), which the decedent had transferred in his lifetime, on the ground that said transfers had been made "in contemplation of death".

(2) In arriving at the value of the net estate upon which the tax was computed the said Commissioner deducted only fifteen thousand, six hundred fifty-four and 02/100 dollars ($15,654.02) on account of "executor's fee", whereas and in fact the true and correct amount which the estate has paid as executor's fee amounts to twenty-five thousand, six hundred fifty-four and 02/100 dollars ($25,654.02).

(3) In arriving at the value of the net estate upon which the tax was computed the said Commissioner deducted from the value of the gross estate only three thousand, five hundred and 00/100 dollars ($3,500) on account of "attorney's fee", whereas and in fact the true and correct amount paid by the estate on account of attorney's fee amounts to twenty-three thousand, five hundred and 00/100 dollars ($23,500).

(4) In arriving at the value of the net estate upon which the tax was computed the said Commissioner deducted from the value of the gross estate only two and 00/100 dollars ($2) on account of "miscellaneous administration expenses", whereas and in fact the true

amount of expenses paid amounted to one thousand, five hundred sixty-nine and 71/100 dollars ($5,569.71):

(5) In arriving at the value of the net estate upon which the tax was computed the said Commissioner refused to allow any deduction on account of the Massachusetts inheritance tax, which by law is a claim against the estate, and on account of which the executor of the said estate paid to the Commonwealth the sum of thirty-four thousand, one hundred fifty-eight and 59/100 dollars ($34,158.59).

9. That on or about May 28, 1928 the said Commissioner of Internal Revenue reconsidered the plaintiff's original claim for refund and excluded the value of the said transferred property ($404,450.74), but refused to make any further adjustments in regard to the amounts to be deducted from the said gross estate on account of the executor's fee, attorney's fee, miscellaneous administration expenses or the Massachusetts inheritance tax, and redetermined the total tax upon the said estate to be forty-nine thousand, one and 29/100 dollars ($49,001.29) as is shown in column 3 of the plaintiff's amended bill of particulars attached hereto.

10. That on or about June 30, 1928 the said Commissioner of Internal Revenue refunded and paid to the plaintiff forty-three thousand, eight hundred sixty-five and 37/100 dollars ($43,865.37), said amount representing the tax paid as aforesaid on the said transferred property, together with the interest thereon.

11. That the plaintiff is rightfully entitled by law to deduct from the value of the gross estate the respective amounts as stated in paragraph 8 above on account of executor's fee, attorney's fee, miscellaneous administration expenses and the Massachusetts inheritance tax, so that the true and correct total tax upon the said estate, computed according to law, was and is forty-one thousand, four hundred twenty-

eight and 66/100 dollars ($41,428.66) as shown in column 4 of the plaintiff's amended bill of particulars attached hereto.

12. That the balance of said excess overpayments rightfully due and refundable to the plaintiff is eight thousand, one hundred forty-three and 06/100 dollars ($8,143.06), together with the interest thereon amounting to three thousand, two hundred thirty-three and 99/100 dollars ($3,233.99), or a total sum of eleven thousand, three hundred seventy-seven and 05/100 dollars ($11,377.05) as is shown on page 2 of the plaintiff's amended bill of particulars attached hereto.

13. That the said Commissioner of Internal Revenue refused and still refuses to refund and pay to the plaintiff the said sum ($8,143.06) or the interest thereon ($3,233.99), or any part thereof, wrongfully, erroneously and illegally collected from the plaintiff as aforesaid.

Wherefore the defendant owes the plaintiff eight thousand, one hundred forty-three and 06/100 dollars ($8,143.06), together with the interest thereon at the rate of six percent per annum from the respective dates of payment until the same shall be paid as shown on page 2 of the plaintiff's amended bill of particulars attached hereto.

COUNT II.

(For the same cause of action.)

And the plaintiff says that the defendant, Malcolm E. Nichols, owes him eight thousand, one hundred forty-three and 06/100 dollars ($8,143.06) for money had and received by the defendant to the plaintiff's use, together with the interest thereon at the rate of six percent per annum from the respective dates of payment until the same shall be paid, as shown on page 2 of the plaintiff's amended bill of particulars attached hereto.

O. W. TAYLOR,
WHITE & WHITE,
Attorneys for Plaintiff.

PLAINTIFF'S AMENDED BILL OF PARTICULARS.

1. Summary of the Estate.

	Column No. 1. Commissioner's Audit Mar. 16, 1923.	Column No. 2. Plaintiff's original Claim.	Column No. 3. Commissioner's Audit May 28, 1928.	Column No. 4. Plaintiff's Amended Claim.
GROSS ESTATE				
Real Estate	$84,785.00	$84,785.00	$84,785.00	$84,785.00
Transfers	404,450.74			
Securities	395,146.51	395,146.51	395,146.51	395,146.51
Miscellaneous	267,375.54	267,375.54	267,375.54	267,375.54
Total	$1,151,757.79	$747,307.05	$747,307.05	$747,307.05
DEDUCTIONS.				
Funeral expenses	$996.00	$996.00	$996.00	$996.00
Adm. Expenses:				
Executor's fee	15,654.02	15,654.02	15,654.02	25,654.02
Attorney's fee	3,500.00	3,500.00	3,500.00	23,500.00
Miscellaneous	2.00	2.00	2.00	1,569.70
Claims against Estate:				
Debts of decedent	8,642.13	8,642.13	8,642.13	8,642.13
Federal Estate Tax		43,637.54		
Mass. Inher. Tax				34,158.59
Charitable bequests	8,500.00	8,500.00	8,500.00	8,500.00
Specific Exemption	50,000.00	50,000.00	50,000.00	50,000.00
Total Deductions	$87,294.15	$130,931.69	$87,294.15	$153,020.44
Net Estate for Tax	$1,064,463.64	$616,375.36	$660,012.90	$594,286.61
Total Tax	$89,735.64	$43,637.54	* $49,001.29	$41,428.66

* Error. Tax on net estate of $660,012.90 is $48,001.29.

2. Statement of Tax and Interest Payments.

Tax and Interest Paid:

Tax paid November 9, 1919, as per return		$37,700.68
Additional tax paid Februrry 21, 1921		50,000.00
Additional tax paid March 27, 1922		2,034.96
Total tax paid as shown in Column 1, above.		$89,735.64
Interest @ 10% paid:		
On $52,034.96 from 5/22/21 to 2/21/22	$3,920.44	

On $5,955.40 from 5/22/21 to 3/31/22 . . .	62.00	
Total interest paid . . .	3,982.44	
Total tax and interest paid		$93,718.08
Tax and Interest Payable:		
Tax paid November 9, 1919, as per return	$37,700.68	
Additional tax due February 21, 1921	3,727.98	
Total tax due as shown in Column 4, above	$41,428.66	
Interest @ 10% payable:		
On $3,727.98 from 5/22/21 to 2/21/22	280.89	
Total tax and interest payable		41,709.55
Tax and interest legally refundable . . .		$52,008.43
Less amount refunded June 30, 1928 . . .		43,865.37
Balance refundable		$8,143.06
Interest on refund @ 6% if paid November 1, 1928:		
On $2,125.66 from 2/21/22 to 11/1/28	$853.10	
On $6,017.40 from 5/27/22 to 11/1/28	2,380.89	
Total interest payable to the estate . .		3,233.99
Total amount refundable if paid November 1, 1928		$11.377.05

Also at the same term, to wit, January 3, 1929, the following Defendant's Answer to Plaintiff's Amended Declaration was filed:

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED DECLARATION.

[Filed January 8, 1929.]

I. Now comes the defendant in the above-entitled action and, without waiving his exception to the ruling of the court in granting the plaintiff's motion to amend his declaration, denies each and every allegation, item, count and particular in the plaintiff's amended declaration contained.

II. And further answering the defendant says that in the claim for refund filed by the plaintiff on or about June 20, 1925, the only grounds set forth for a refund of the taxes paid are that certain alleged gifts were improperly included in the decedent's gross estate, and that the federal estate tax itself was deductible from the decedent's gross estate; that by the plaintiff's amended declaration he seeks to recover on account of taxes paid by reason of their not having been deducted from the value of the decedent's gross estate amounts paid for executor's fees, attorney's fees, miscellaneous administration expenses, and amounts paid on account of Massachusetts inheritance tax. And the defendant says that said claim for refund does not comply with the provisions of Section 3226 of the Revised Statutes as amended by Section 1014 (a) of the Revenue Act of 1924, in that said claim for refund does not contain all the facts relied upon by the plaintiff in support of his claim.

III. And further answering the defendant says that the amounts paid by the plaintiff as alleged in paragraph 8, subdivisions 2 to 5, inclusive, of his amended declaration, were paid by him subsequent to the bringing of this action and are not recoverable herein.

IV. And further answering the defendant says that the taxes for which recovery is sought in this action were all paid prior to June 2, 1924, and that no portion of said taxes

was paid under protest. Wherefore, the defendant says that no portion of said taxes may be recovered in this action.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

The within answer may be filed.

O. W. TAYLOR,
Attorney for the Plaintiff.

This cause was thence continued to the March Term, A. D. 1929, when, to wit, May 4, 1929, the following Agreed Statement of Facts was filed:

AGREED STATEMENT OF FACTS *IN RE* PLAINTIFF'S AMENDED DECLARATION.

[Filed May 4, 1929.]

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the following statement of facts is true, and may be included in the findings of fact by the court in the above-entitled cause:

1. That the plaintiff, Robert M. Leach, is a citizen of the Commonwealth of Massachusetts, residing at Taunton in the County of Bristol, Massachusetts, within this district, and that under and by virtue of letters testamentary issued to him on the sixth day of December, 1918 by the Probate Court at Taunton in said County of Bristol, Massachusetts, the plaintiff was at all times thereafter, and now is, the duly qualified executor of the estate of William E. Walker, late of Taunton in said County of Bristol, Massachusetts, who died testate on the ninth day of November, 1918.

2. That the defendant is now residing in Boston in the County of Suffolk, Massachusetts, and was aforetime, to wit, from the first day of August, 1921 to the thirty-first day of

August, 1925, the duly qualified United States Collector of Internal Revenue for the Third District of Massachusetts.

3. That on or about the eighth day of May, 1919, the plaintiff, as executor, seasonably filed with the Collector of Internal Revenue the Federal Estate Tax Return for the estate of the said William E. Walker, disclosing all items of property comprised in the gross estate as of November 9, 1918, showing the executor's estimated value thereof, and thereupon did pay to the said Collector the sum of thirty-seven thousand, seven hundred and 68/100 dollars ($37,700.68), being the total tax disclosed on said return.

4. That on the twenty-first day of February, 1922, after notice had been given to the plaintiff by the defendant that a large additional tax would be assessed against the said estate, but before the said Commissioner had made his final decision as to the plaintiff's protest against the said proposed additional tax, the plaintiff, in order to avoid the payment of 10 percent interest on such additional tax upon the estate as the Commissioner might ultimately determine, paid to the defendant, as he was Collector of Internal Revenue as aforesaid, the additional sum of fifty thousand dollars ($50,000), and said payment was accepted by the defendant as a partial payment of the proposed additional tax to be determined by final decision of the said Commissioner of Internal Revenue.

5. That on the eighteenth day of March, 1922, the said Commissioner of Internal Revenue determined the [redacted] tax upon the said estate to be eighty-nine thousand, seven hundred thirty-five and 64/100 dollars ($89,735.64), as shown in column No. 1 of the plaintiff's amended bill of particulars attached to amended declaration.

6. That on the twenty-fourth day of March, 1922, the defendant demanded of the plaintiff the balance of said total tax ($89,735.64), as determined by the said Commissioner, in the amount of two thousand, thirty-four and 96/100 dollars ($2,034.96), and interest in the amount of three thousand,

nine hundred eighty-two and 44/100 dollars ($3,982.44), and the said sums in the total amount of six thousand, seventeen and 40/100 dollars ($6,017.40) were as a result of the defendant's demand for payment of the same paid to the defendant by the plaintiff on the twenty-seventh day of March, 1922.

7. That in determining the value of the gross estate of the decedent, the Commissioner included therein certain property of the value of four hundred four thousand, four hundred and fifty dollars and 74/100 ($404,450.74), which the decedent had transferred in his lifetime, on the ground that said transfer had been made by the decedent " in contemplation of death ".

8. That in arriving at the value of the net estate upon which the said total tax was computed, the Commissioner deducted therefrom fifteen thousand, six hundred and fifty-four and 02/100 ($15,654.02), on account of " executor's fee " and made no deduction on account of additional executor's fee in the amount of ten thousand dollars ($10,000), paid on or about July 31, 1928, making the total paid on account thereof twenty-five thousand six hundred fifty-four and 02/100 ($25,654.02) dollars.

9. That in arriving at the value of the net estate upon which the said total tax was computed the Commissioner deducted from the value of the gross estate thirty-five hundred dollars ($3,500) on account of " attorney's fee " and in addition to said amount, the estate paid twenty thousand dollars ($20,000) on or about July 31, 1928, making the total paid on account of attorney's fee twenty-three thousand five hundred dollars ($23,500).

10. That in arriving at the value of the net estate upon which the said total tax was computed the said Commissioner deducted from the value of the gross estate two dollars ($2) on account of " miscellaneous administration expenses " and in addition to said amount the estate paid one thousand five hundred sixty-seven and 71/100 ($1,567.71), as such expenses on July 31, 1918.

11. That in arriving at the value of the net estate upon which the said total tax was computed the Commissioner did not make any deduction or allowance for the amount required to pay the Massachusetts inheritance tax, which the estate was required to pay and did pay to the Commonwealth of Massachusetts in the total amount of thirty-four thousand one hundred fifty-eight dollars and 59/100 ($34,158.59).

12. That on about May 28, 1928, the said Commissioner of Internal Revenue reconsidered the plaintiff's original claim for refund and excluded the value of the said transferred property ($404,450.74), but made no further adjustments in regard to the amounts deducted from the said gross estate on account of executor's fee, attorney's fee, miscellaneous administration expenses or the Massachusetts inheritance tax, and redetermined the total tax upon the said estate to be forty-nine thousand, one and 29/100 dollars ($49,001.29) as is shown in column 3 of the plaintiff's amended bill of particulars attached to amended declaration.

13. That on or about June 30, 1928, the said Commissioner of Internal Revenue refunded and paid to the plaintiff forty-three thousand, eight hundred sixty-five and 37/100 dollars ($43,865.37), said amount representing the tax paid as aforesaid on the said transferred property, together with the interest thereon.

14. That on or about the twentieth day of June, 1925, the plaintiff filed with the defendant, as he was Collector of Internal Revenue, a claim for refund of estate taxes paid upon the said estate and a true copy of said claim for refund is attached hereto and marked "Exhibit A".

15. That on or about May 28, 1928, the Commissioner of Internal Revenue having reopened and reconsidered the said claim issued to the estate a certificate of over-assessment showing the total tax liability as finally determined by the Commissioner to be forty-nine thousand one and 29/100 dollars ($49,001.29) upon which there was interest of eight

hundred fifty-one and 42/100 dollars, and a true copy of said certificate of over-assessment being attached hereto and marked "Exhibit B".

16. That if the plaintiff is entitled to recover on all of the grounds as alleged in his amended declaration, the amount to be recovered is eight thousand one hundred forty-three and 06/100 ($8,143.06) dollars together with the legal interest thereon refundable by law as a part of the tax.

O. WALKER TAYLOR,
Attorney for Plaintiff.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorney for Defendant.

PLAINTIFF'S EXHIBIT 12.

TREASURY DEPARTMENT INTERNAL REVENUE SERVICE.

(Execute Separate Form for Each Tax Period)

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

Collector's Notation Account Number Original Copy
Date Received Received Jun 20 1925 District
of Mass State Tax Division

State of Massachusetts
County of Bristol ss:

ET–1546–Cl. A.–LSP.

(Name of taxpayer or purchaser of stamps.) Estate of William E. Walker, c/o Robert M. Leach, Executor.

(Business address.) 43 Taunton Green, Taunton, Massachusetts.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged Fiduciary
2. Character of assessment or tax Estate
3. Amount of assessment or stamps purchased
   Tax and Interest paid $93,718.08
4. Reduction of Tax Liability requested (Income and Profits Tax)
5. Amount to be abated
6. Amount to be refunded (or such greater amount as is legally refundable) including interest $60,058.03
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Feb. 31, and Mar. 27, 1923.
8. District in which return (if any) was filed Massachusetts.

EXHIBIT "A"

1. The executor says that in the final determination upon the estate, as shown in the Treasury Department (ET-1546-Cl. A.-LSP) dated March 18, 1922, the Commissioner of Internal Revenue improperly and wrongfully included in the gross estate so-called "Gifts and Transfers" of the value of $404,450.74, and that no part of the said transferred property should be included in the gross estate because:

(1) The amount shown above does not represent one transaction or gift but a series of gifts, no one of which constituted a material part of the decedent's gross estate. Is it not reasonable to suppose that if the decedent contemplated death at the time of these gifts he would have given the whole amount at one time?

(2) At the time each and every one of these gifts was made, the decedent was in good health and was just as active and as much interested in the affairs of life as he had always been. He was not suffering from any chronic or malignant affliction or severe spell of sick-

ness, and his whole mental attitude was that of a man who expected to live a long time. He died very suddenly as a result of a shock of but a few days duration.

(3) As to the gift to Mrs. Jennie E. Walker, the decedent's widow, he had always made a practice of giving her periodic presents, and the particular gift to her at the time here in question was made to her partly in accordance with the usual practice of the decedent and partly because of his desire to furnish her with an independent income of her own in order that he might thereby be relieved from the necessity of making periodic allowances to her for her personal comfort and support.

(4) The gifts to Mrs. Mary W. Leach, who was the decedent's daughter, were also made to her in order that she might have an income of her own. These gifts were made around Christmas time, and in fact the decedent intended these gifts as a Christmas present to his daughter, which is quite natural and is to be expected of a man possessing the means of this decedent.

(5) The gifts which were made to Robert M. Leach were made pursuant to a promise made many years before by the decedent to reward the said Robert M. Leach for his long and faithful service to the decedent in his personal affairs as well as in the building up of the Weir Stove Company, out of which the decedent made practically his entire fortune.

(6) It is to be noted also that these gifts were made during the year when the income and surtaxes were particularly heavy, and by making the gifts during this period we believe the decedent was greatly influenced by the fact that thereby he would accomplish a very substantial reduction in his individual income and surtaxes, just as many other thoughtful and prudent man did and were doing during that unsettled war period.

As to the gifts in question, your attention is called to the affidavits already on file with the department, which, it is submitted, clearly and fully support all of the foregoing contentions of the executor, and we respectfully request that the department reconsider its determination of these gifts in the light of the more recent decisions as to just what circumstances must prevail in order to establish conclusively the presumption of contemplation of death.

2. And the executor further says that the estate tax itself is a deductible "claim or charge against the estate", according to the provisions of the Act of 1917, under which the tax is imposed upon this estate, and that in the computation of the tax there should be deducted an amount equal to the tax, because:

> "(1) Section 203, of Title II of the Act of September 8, 1916, as amended, as reenacted and approved by the Act of 1917, provided that all "claims against the estate . . . and such other charges as are allowed by the laws of the jurisdiction under which the estate is being administered" should be deducted in the determination of the net estate, and because
>
> (2) The United States Supreme Court has held that under the acts prior to the Act of 1918, which later act made an express exception the "estate tax" imposed by the State of Pennsylvania was deductible for the purposes of the Federal Tax. See *Lederer* v. *Northern Trust Co.*, 262 Fed. 52; 40 Sup. Ct. 483.

The executor contends that if the estate tax of a State was deductible under the Act of 1917 as "a claim against the estate" it must necessarily follow that the amount required to pay the Federal estate tax should be deducted, because there is no difference in principle between the State estate tax and the Federal estate tax. The Federal tax is a claim exactly analogous to the Pennsylvania tax. If it had not been the

intent of Congress, in the enactment of the Act of 1917, to allow "all claims against the estate" to be deducted, including the estate tax, that intent would have been expressed as was done in the Act of 1918 and all later acts.

The executor contends, therefore, that the computation of the tax under the Act of 1917 should show as a deduction an amount equal to the amount of the total tax required to be paid.

The computations of the tax as determined by the Bureau in the closing letter and that based on the foregoing contentions of the executor are shown in the following summary:

Computation of the Tax.

	Column 1 As determined by the Bureau.	Column 2 As claimed by the executor.
Gross Estate:		
Real estate	$84,785.00	$84,785.00
Gifts and transfers	404,450.74	
Stocks and bonds	395,146.51	395,146.51
Mortgages, notes, etc.	267,375.54	267,375.54
Total Gross Estate	$1,151,757.79	$747,307.05
Deductions:		
Funeral and administration expenses	20,152.02	20,152.02
Claims against the estate:		
Debts of decedent	8,642.13	8,642.13
Estate tax		43,637.54
Charitable bequests	8,500.00	8,500.00
Specific exemption	50,000.00	50,000.00
Total Deductions	87,294.15	130,931.69
Net Estate for Tax	$1,064,463.64	$616,375.26

	Tax	
On $1,000,000.00	82,000.00	
" 64,463.64 @ 12%	7,735.64	
" 450,000.00		27,000.00
" 166,375.36 @ 10%		16,637.54
Total Tax	$89,735.64	$43,637.54

Statement of Tax Payments and Interest.

Tax and Interest as Determined:		
Original tax paid as per return	$37,700.69	
Additional tax paid Feb. 21, 1922	50,000.00	
Additional tax paid Mar 27, 1922	2,034.96	
Total tax as per Col. 1 above	$89,735.64	
Interest paid Mar. 27, 1922	3,982.44	
Total and Interest Paid		93,718.08
Tax and Interest as Claimed:		
Original tax paid as per return	$37,700.69	
Additional tax due—paid Feb. 21, 1922	5,936.85	
Total tax due as per Col. 2 above	$43,637.54	
Interest on $5,936.85 from 5/22/21 to 2/21/22—275 days @ 10%	445.81	
Total Tax and Interest payable		44,083.34

Overpayment Refundable as Claimed	$49,634.74
Interest Claimed—Estimated:	
On $43,617.34—from 2/21/22 @ 6%	9,159.64
On 6,017.40—from 3/27/22 @ 6%	1,263.65
Total Refund and Interest Claimed	$60,058.03

Conclusion.

I respectfully request the opportunity of an oral hearing in Washington, before the Board in the Bureau of Internal Revenue and before the solicitor, in order that further evidence, witnesses and arguments may be presented. In view of the circumstances, I also respectfully request that this claim be considered as soon as possible and a date set for a final hearing on the case.

Respectfully submitted,

Executor.

Sworn to and subscribed before me this day of April, 1925. Before me,

Notary Public.

EXHIBIT "B"

Treasury Department

Office of Commissioner of Internal Revenue

r c Miscellaneous Tax Unit. MT-ET-ATC. May 28, 1928

Certificate of Overassessment

Number: 1546—Mass. Allowed: $43,885.37

Schedule No. MTR-2083

Robert M. Leach, Executor, u/w of William E. Walker, 43 Taunton Green, Taunton, Massachusetts.

Sir: An audit of the estate tax return, Form 706, of the

estate of William E. Walker, who died November 9, 1918 and a consideration of all claims (if any) filed by you indicates that the tax assessed against the estate was in excess of the amount due as per the following statement:

Original assessment (Nov. 1919, P. 8, L. 7)—		$37,700.68
Additional " (Apr. 1921, P. 7, L. 9)—		79,759.16
" " (March, 1922, P. 9, L. 2)—		3,975.91
" " (Feb. 1923 P. 14, L. 8)—		6.53
Total assessments		$121,442.28
Less prior allowance		27,724.20
Remaining assessment		$93,718.08
Less correct tax liability	$49,001.29	
Interest	851.42	49,852.71
Overassessment		$43,865.37

The amount of overassessment will be abated or refunded as indicated below. (The estate will be relieved from the payment of any amount abated; and any amount found to be refundable is covered by a Treasury check transmitted herewith.)

Included in accompanying check is interest in the amount stated below, allowed on the amount formed to be refundable.

Respectfully,

R. M. ESTES

Deputy Commissioner

Date claim filed June 20, 1925.

Refunded: $43,865.37

Instructions executed

Signature, Thomas W. White Collector Int. Rev.

District of Mass.

MT-ET-Cl. 1546-ATC—Massachusetts

Estate of William E. Walker.

The overassessment results from a reconsideration of the estate's claim for refund of $60,058.03.

In view of the evidence now before Bureau the following adjustments are made:

	Returned	Prior Audit	Determined
Stock transferred to Robert M. Leach, November 30, 1917:			
100 shares Weir Stove Company	0.00	$100,000.00	0.00
Stock transferred to Jennie E. Walker, January 21, 1918:			
200 shares Weir Stove Company	0.00	200,000.00	0.00
Stock transferred to Mary W. Leach:			
285 shares Metropolitan Furniture Company	0.00	50,712.90	0.00
49 shares Atherton Furniture Company	0.00	41,231.64	0.00
LeBaron Atherton Note and Accrued Interest	0.00	12,506.30	0.00

The foregoing adjustments are reflected in the following summary:

	Returned	Prior Audit	Determined
Gross estate	$629,785.18	$1,151,757.79	$747,307.05
Deductions	72,778.42	87,294.15	87,294.15
Net Estate	$557,006.76	$1,064,463.64	$660,012.90
Total Tax	37,790.68	89,735.64	49,001.29

This cause was thence continued from term to term to the December Term, A. D. 1929, when, to wit, January 20, 1930, the following Waiver of Jury Trial was filed:

WAIVER OF JURY TRIAL.

[Filed January 20, 1930.]

The parties in the above-entitled cause hereby waive a trial by jury.

O. W. TAYLOR,

Attorney for Plaintiff.

FREDERICK H. TARR,
United States Attorney,
by W. L. MARSHALL,
Special Assistant to United States Attorney,
Attorney for Defendant.

At the same term, to wit, February 19, 1930, said cause was set down for trial, without a jury, upon the amended declaration and agreed facts and the evidence, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence continued under advisement from term to term to the June Term, A. D. 1930, when, to wit, July 24, 1930, an opinion of the court was announced, judgment to be entered for the plaintiff in an amount to be stipulated in accordance with the opinion.

Said cause was thence continued to the September Term, A. D. 1930, when, to wit, October 31, 1930, a draft bill of exceptions was filed by defendant within extended time.

This cause was thence continued to the present December Term, A. D. 1930, when, to wit, December 2, 1930, a substituted bill of exceptions is filed by the defendant and allowed by the court.

On the twenty-ninth day of January, A. D. 1931, the following Motion for Judgment is filed and assented to:

PLAINTIFF'S MOTION FOR JUDGMENT.
[Filed January 29, 1931.]

Now comes the plaintiff in the above-entitled action and moves that judgment be entered for the plaintiff forthwith pursuant to the order of the court in the amount of $3,692.44, with interest at the rate of 6 percent per annum from February 21, 1922, in accordance with the provisions of Section 615 of the Revenue Act of 1928, and costs.

O. W. TAYLOR,
Attorney for Plaintiff.

Thereupon, to wit, January 29, 1931, it is considered by the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Robert M. Leach, executor of the estate of William E. Walker, deceased, plaintiff, recover of the said Malcolm E. Nichols, former Collector of Internal Revenue for the Third District of Massachusetts, defendant, the sum of three thousand six hundred ninety-two dollars and forty-four cents ($3,692.44) damages, together with interest amounting to one thousand nine hundred eighty dollars and thirty-seven cents ($1,980.37) and his costs of suit taxed at

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DEFENDANT'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed and Allowed December 2, 1930.]

This is an action of contract against Malcolm E. Nichols, United States Collector of Internal Revenue, brought originally for the recovery of an additional assessment of Federal estate tax upon the estate of William E. Walker, deceased, late of Taunton, Massachusetts, in the sum of $49,634.73, alleged to have been erroneously and illegally collected under the provisions of Title II of the Revenue Act of 1916 (39 Stat. 777).

The pleadings are referred to and made a part of this bill of exceptions.

The first trial of the case on the original declaration was held before Honorable James A. Lowell, District Judge, and a jury on November 12, 16 and 17, 1926.

At the close of the trial on November 17, 1926, the defendant made a motion for a directed verdict, which was granted by Judge Lowell; the jury returned a verdict accordingly; and thereupon by order of the court judgment was entered for the defendant.

The plaintiff appealed and on December 27, 1927, the Circuit Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court for further

action not inconsistent with its opinion which is reported at 23 Fed. (2d) 275.

On September 28, 1928, the plaintiff moved to amend his declaration by substituting therefor plaintiff's amended declaration. This motion was allowed by Judge Brewster on October 8, 1928.

On May 4, 1929, the parties entered into "An Agreed Statement of Facts in re Plaintiff's Amended Declaration", which statement is incorporated herein by reference.

On February 19, 1930, the case was heard by the court, a stipulation waiving a jury having been filed, upon plaintiff's amended declaration; upon the "Agreed Statement of Facts in re Plaintiff's Amended Declaration"; and upon oral testimony.

At the opening of the trial, on plaintiff's amended declaration, the defendant moved to dismiss the action on the ground that the court was without jurisdiction because it appeared in the declaration that the original claim for refund was filed June 20, 1925; that the return of the marshal showed that the summons was issued to him on December 1, and served on December 3, 1925; and that there was no allegation in the declaration either that the Commissioner had rejected the claim, or that six months had elapsed from the date of filing the claim for refund prior to the bringing of the action, and that in consequence, under the provisions of Section 1113 of the Revenue Act of 1926 (44 Stat. 116), the court was without jurisdiction.

The court overruled the defendant's motion and granted an exception.

The defendant thereupon made a second motion to dismiss the amended declaration on the ground that it failed to set up that any claim for refund or amendment to any claim for refund or any amended claim for refund on the new grounds alleged in the amended declaration had ever been filed with the Commissioner of Internal Revenue prior to the com-

mencement of the action or prior to the amendment of the declaration.

The court overruled the motion to dismiss the declaration and the amended declaration and granted an exception to the defendant.

The oral testimony introduced at the trial is, so far as material, here set forth in narrative form.

ROBERT M. LEACH, the plaintiff, called as a witness in his own behalf, being duly sworn, testified to the following effect:

By occupation he is a stove manufacturer and had had relationship to the estate of William E. Walker as executor of the estate, having been appointed executor as shown by certificate of the Probate Court of Taunton, Massachusetts, which he identified as Plaintiff's Exhibit No. 1. As executor of the estate he filed the estate tax return on Form 706 showing a tax upon the estate of $37,700.68, which was identified and admitted as Plaintiff's Exhibit No. 2. He received a letter from the Commissioner dated April 14, 1921, showing an additional tax due from the estate in the amount of $79,759.16 which he identified and which was admitted as Plaintiff's Exhibit No. 3. He filed a claim asking that the entire $79,759.16 should be abated and requesting a hearing before the Bureau, which claim was identified and admitted as Plaintiff's Exhibit No. 4. He paid the $37,700.68 tax shown on the return to the collector and he was shown an estate tax receipt for $50,000, dated February 21, 1922, and signed by Malcolm E. Nichols, Collector, which he said he recognized and that he paid the $50,000 some time after he had paid the $37,000, which receipt was identified and admitted as Plaintiff's Exhibit No. 5. He received and remembered a letter from the Collector of Internal Revenue dated March 24, 1922, and the letter dated March 18, 1922, enclosed with it in which the Commissioner allowed his claim for abatement in the sum of $27,000 and rejected it as to

$52,000, which letters were identified and admitted as Plaintiff's Exhibits Nos. 6 and 7. He was then shown another estate tax receipt for $6,017.40 dated March 27, 1922, signed by Malcolm E. Nichols, Collector, which he identified as Plaintiff's Exhibit No. 8. He was shown a copy of a claim on Treasury Department, Form 843, dated June 20, 1925, for the refund of $60,058.03, on which he said the signature was his, which was admitted as Plaintiff's Exhibit 9. He received a letter from the office of the Commissioner, dated August 7, 1925, addressed to Robert M. Leach, Executor, which was admitted in evidence as Plaintiff's Exhibit No. 10, of which the following portion was read into the record:

> "Reference is made to claim for refund of estate tax paid by the above named estate and to the evidence filed in support thereof. In compliance with your request a hearing has been scheduled for 11 A. M., August 26, 1925, to be held in Building C, 6th and B Streets, Southwest. Any further evidence you may care to submit should be filed with the Bureau at least five days prior to the date of the conference."

He identified the letter dated January 16, 1926, from the office of the Commissioner of Internal Revenue, which was admitted as Plaintiff's Exhibit No. 11, described as a letter in which the Commissioner rejected his claim for refund. He said that at some time before this letter was written to him he had a conference in Washington. At this point a letter dated April 21, 1928, addressed to the General Counsel, Bureau of Internal Revenue, and initialed "O. W. T.: P" was admitted as Plaintiff's Exhibit 12 without objection. Then a letter dated April 26, 1928, addressed to O. Walker Taylor and signed by C. M. Charest, General Counsel, was admitted without objection, marked "Plaintiff's Exhibit 13", and read into the record as follows:

> "O. Walker Taylor, 11 Beacon Street, Boston, Massa-

chusetts. *In re* Robert M. Leach, Executor of the Estate of William E. Walker. Receipt is acknowledged of your letter of April 21, 1928, regarding the above entitled estate. After careful review of the question involved, this office on April 25, 1928, recommended that the claim for refund be reopened and allowed to the extent of excluding from the gross estate transfers heretofore held taxable."

A letter dated April 26, 1928, addressed to Honorable D. H. Blair and signed by O. W. Taylor, was admitted without objection as Plaintiff's Exhibit No. 14, and letter dated May 2, 1928, signed by D. H. Blair, Commissioner, and addressed to O. W. Taylor, was admitted as Plaintiff's Exhibit No. 15 without objection.

The witnsss was then shown a printed form letter dated May 7, 1928, signed by R. M. Estes, Deputy Commissioner, addressed to Robert M. Leach, Executor, which he said he received and which was admitted as Plaintiff's Exhibit No. 16, and was in part read into the record as follows:

"As a result of an audit of the Estate Tax Return 706 on the above named estate and consideration of all claims filed on behalf thereof, a certificate of overassessment is being prepared," . . .

The witness said the letter shown him had reference to the certificate of overassessment for the last $1,000 paid him. The witness was then shown a photostat copy of the certificate of overassessment for $1,017.38, the original of which he said he must have received, although he did not have it with him and did not know where it was. He identified a letter of August 21, 1929 from Thomas W. White, Collector, which letter and the photostat copy of certificate of overassessment were admitted as Plaintiff's Exhibits Nos. 17 and 18. He testified that he received the $1,000 very soon after the date of the letter. The witness was then shown a letter of

July 3, 1928, signed by Thomas W. White, Collector, addressed to him and which he said he received, and the letter notifying the executor of $43,865.37 was then admitted in evidence as Plaintiff's Exhibit No. 19. The witness then identified certificate of overassessment showing the amount of tax refund to be $43,865.37 and interest thereon to be $16,463.95, which certificate of overassessment was admitted in evidence as Plaintiff's Exhibit No. 20. The witness was then shown a paper dated May 3, 1929, entitled "Treasury Department Form 843", entitled "Amendment to Claim for Refund of Taxes Illegally Collected", the signature of which he said was his own; that he was familiar with its contents, and that he authorized the filing with the Collector of Internal Revenue. Defendant objected to its admission on the ground that it shows on its face that it was not filed with the Collector of Internal Revenue within four years after the tax was paid, and that it was incompetent and irrelevant and immaterial. The court overruled defendant's objection, admitted the document in evidence as Plaintiff's Exhibit No. 21, and saved an exception to the defendant. The witness then testified that he recalled that, after the Circuit Court of Appeals handed down its decision in this case, he went to Washington in the spring of 1928 in connection with the reopening of the case, and that he had a conference in the Commissioner's office with Mr. Blair and also in the Estate Tax Division.

The further examination of the witness was as follows:

"*Q.* 1. Did you at that conference discuss the question of the gifts in contemplation of death? *A.* Yes, sir, we discussed that.

Q. 2. Did you discuss the question of additional attorneys' fees?

Mr. SABINE. Now, may it please your Honor, I object to that until it is shown when those additional attorneys' fees were paid and the date of this conference, whether it was after the time to file a claim for refund had expired or not.

The COURT. It clearly was, because it was after the opinion had come down. I will receive evidence as to the claims that they considered. I do not care about the conversations exactly, but what claims were considered at that time.

Mr. TAYLOR. Yes, sir. I know I am asking the witness a little leading question, but I am doing it to save time.

Mr. SABINE. I would like to object on the ground that it is incompetent, irrelevant and immaterial, and ask that you allow my exception.

Q. 3. Did you discuss the question of additional attorneys' fees? *A.* We discussed additional expenses that were being incurred continually in the case, attorneys' fees and other things.

Mr. SABINE. May I have the same objection noted and the same ruling, your Honor please?

The COURT. Yes, sir.

Q. 4. And at that conference was the question of the Massachusetts Inheritance Tax taken up? *A.* Yes, sir.

Mr. SABINE. Before that is answered, I would like to have the same objection, on the ground that it is incompetent, immaterial and irrelevant, and the same ruling.

The WITNESS. Yes; we did discuss that.

Q. 5. In other words, Mr. Leach, did you discuss all of the questions as now outlined in the amended declaration which has been read here?

Mr. SABINE. Just a minute. I want to object to that on the ground that it is incompetent, irrelevant and immaterial, and it was after the time for filing claim for refund had expired. Same ruling, I suppose?

The COURT. All right.

A. We discussed all of those items. . . .

Mr. TAYLOR. All right. We will withdraw that question.

The COURT. Mr. Taylor, I perhaps ought not to intimate that the conversation could not under any circumstances be material. You know better than I do whether you want to

develop that any farther. Of course I can conceive a conversation that might have a very important bearing on the question of waivers. The thing to be disposed of later, the question whether there can be any waiver. I wanted to correct an impression which I may have given you. I said I did not think I would be interested in what was said. I don't know that I am. That is for you to decide.

Mr. TAYLOR. The only reason we wanted to put in what was said, your Honor, was because we hoped later on to show what the policy and custom of the Commissioner was before the issuance of this Treasury Decision of May 27, 1929. We have Government officials here to show that even blanket claims were considered and all kinds of conversations were allowed, and those blanket claims were admissible.

Q. 6 (by Mr. TAYLOR). Mr. Leach, what did they say—what was said by the Government officials at this conference in November with reference to the additional attorneys' fees?

Mr. SABINE. Now, may it please your Honor, I object to that.

The COURT. Can't we save time by having a general ruling that all this testimony as to what transpired at this interview is objected to and is received by the court over the objections of the defendant and all exceptions saved?

Mr. SABINE. That would be fine, your Honor. I appreciate it."

Plaintiff then testified that he could not recall the conversation with regard to allowing him to deduct from the estate the further attorneys' fees. It was discussed. He remembered they brought up the Massachusetts Inheritance Tax, and it was to be considered. He thought a hearing was to be had on it. It was discussed there at Washington and he understood it was to be taken up and considered. The Government official that they were before said so. That was Mr. Blair. They went to Mr. Blair's office first and had a con-

versation with him for a while. Then, afterward, they went to the other building. Mr. Blair said he would consider all the points they had raised.

He remembered a conference in Washington, at the office where they went afterward, at which a Government official asked him if the fees had been paid the attorneys—the additional fees. He told him they had not arrived at the amount.

To the question:

"*Q.* 7. Was anything said by the Government officials then as to whether or not you could deduct these additional attorneys' fees that had not yet been paid?"

the defendant made the following objection:

"Mr. SABINE. I object to that as leading, as incompetent, irrelevant and immaterial. The Government attorneys could not waive the statute.

Mr. WHITE. The man's recollection was exhausted, and I was trying to recall certain specific things.

The COURT. Who was the party with whom he was talking?

Mr. WHITE. It was this conference.

The COURT. Who was it?

Mr. WHITE. There were about eight or ten of them there. Mr. Estes' office. There was a large group at this conference.

The COURT. I think it is only significant as showing they talked over the claims. I do not think you could hold the Government bound by what they said.

The WITNESS. I think I could state it.

Q. 8. State it. *A.* As I remember, we went to Mr. Blair's office, then went to this other building, a large room with, I should think, ten or twelve men there. We discussed these other items, as to what other expenses might be incurred, as to lawyers' fees and expenses back and forth, traveling and so forth. Those were all discussed at that place.

Q. 9. At that time additional attorneys' fees had not been paid? *A.* They had not been paid; no, sir."

JAMES H. RUSSELL, called as a witness for the plaintiff, being duly sworn, testified to the following effect:

He is head of the claims division in the office of the Collector of Internal Revenue and as head of that division it was his duty to receive claims for refund filed by taxpayers. He had been in the claims division since 1919 and the head of it since 1922.

To the question:

"*Q.* 1. Would you state what the requirements were with regard to filing claims for refund throughout 1920, '21 and '22? That is to say, would you receive as a claim a so-called blanket claim, or was it required that they set out every specific item upon which the refund was allowable?"

the following objection was made by the defendant:

"Mr. SABINE. Now, may it please your Honor, I object to that, because the regulations speak for themselves and the law speaks for itself as to what they—

The COURT. On a question of waiver, wouldn't it be material to know that the Government did not insist upon strict compliance with the regulation, because as I remember the Alexander case it said that strict compliance was something the Government could, if they wanted to, insist upon, but it was very readily waived?

Mr. SABINE. Yes, but that was where it was waived and the court said they still have time to file a proper claim for refund and the time has not gone by within which they could file it, and it would be useless to make them go back and start the suit all over again. But it did hold definitely in the last few sentences—of course it is well settled no officer of the Government can waive the Statute of Limitations—and then quotes the Finn case.

The COURT. I do not think I can question the soundness of that decision, but there is a question here as to whether the statute runs and that is a question of law to be determined later. And I will so consider it settled that the compliance

to the rules is a condition precedent, if you have a right to maintain your suit; and this evidence is material on that question, as to whether and to what extent the Government insisted upon literal, strict compliance with the rules.

Mr. SABINE. Would your Honor grant me an exception?

The COURT. Oh, yes. It would all be received over your objection and subject to your exception. Go ahead."

Witness then testified to the following effect:

On the estate tax claims, the claims division was more of a recording agency and the estate tax section reviewed those claims and sent them forward, after which they completed their record. He did not know just what was meant by "blanket claims". Such claims, saying merely the tax is assessed in a certain matter against an individual or an estate were illegal and "We request a refund of such amount", or any such language as that would be immediately turned over to the estate tax section, which was a department of his office. He couldn't answer that he had received such claims on estate taxes. They did receive what might be called skeleton or blanket claims on income taxes. They would be forwarded to the Bureau for consideration as to whether they constituted claims and they had had them sent back and stated that the Bureau would not accept them. He had no personal knowledge of any instance in which a refund was allowed as a result of a blanket claim and later conferences and negotiations with the Commissioner. He could not tell whether his records would show that any such claims had been allowed because they would have nothing in their office to distinguish between what you might call a skeleton or blanket claim and a claim with full facts set forth. The amendment to the claim for refund (Plaintiff's Exhibit 21) was filed with him on that day (May 3, 1929). There were cases of income taxes where claims had been sent to the Bureau, recorded by his office and sent to the Bureau for their consideration, and those claims had been sent back to them prior to that date

with advice that, inasmuch as they did not state the ground in full, they would not be accepted. So far as he knew the amendment to this claim, when it went down to the Bureau, was never returned to his office saying that it would not be considered and was accepted and retained by the Commissioner to be acted upon. He recalled the refund which was made to Mr. Leach amounting to about $1,000 with interest. They had a copy of the certificate of overassessment (Plaintiff's Exhibit 18), showing what the refund of $1,017 and some interest was refunded for.

CHARLES A. DECOURCEY, called as a witness for the plaintiff, being duly sworn, testified to the following effect:

He had been employed in the office of the Collector of Internal Revenue from December 16, 1918 until October 1st of last year (1929). For six years prior to his leaving the service he was in charge of the estate tax division under the Collector of Internal Revenue and received returns filed for estate taxes in his division. He was familiar with the 60-day notice. After such notice had been given it was his custom to mail to executors the estate tax return. Plaintiff's Exhibit 2 was the form he sent out at that time. It was the practice to send out this form from the office while he was employed there. He would say that the mark on the printed return form put through the printed words "State Inheritance Tax" under the word "Deductions" in the estate tax return filed some time in 1919 was put through in his office, and before the return was mailed to the executor. The Commissioner allowed as a deduction at one time the state inheritance tax. The blank was so printed. Later the ruling was reversed and they received notice that the inheritance tax was not an allowable deduction, and thereafter it was the custom to cross that item off from the list of deductions. He was familiar with Section 207 of the Act (1916). It was the policy to disallow the

deduction of the Massachusetts tax after the Commissioner had ruled that it was not allowable, and this, of course, was on the audit of the return by the collector.

On *cross examination* the witness testified in effect:

He could not tell from looking at the estate tax return the date upon which the blank form for that return was sent to the executor, nor how many months after he received the 60-day notice of death he sent out the blank form. He could tell what the practice was. The time varied from about three months to say six or nine months after 704 (the 60-day notice of death) was filed, depending upon how busy they were at the office. In his opinion the estate tax return form was undoubtedly sent after March 1919. He knew that the Internal Revenue Act of 1918, passed February 25, 1919, provided that inheritance taxes of the different states were not allowable as a deduction from the gross estate of the decedent. He thought in all probability that the blank form of estate tax return was sent to the executor after March 1, 1919. He did not know just when the office went through the blanks and scratched out the line on all forms for the return of Federal estate taxes, whether after the Act was passed or before. It seemed to him it was more on account of those two conflicting rulings of the Commissioner, that is, the first one allowing it and the second disallowing it, but he would not say it was done after February 25, 1918. The ruling he had in mind was not the ruling that where the legatee was obliged to pay the tax and the tax was on the right to receive, in such cases the tax was paid by the legatee and not by the estate, and therefore was not deducted. He did recall the ruling that where the inheritance tax of an estate was imposed on the legatee and not on the estate that the tax was not deductible from the gross estate.

On *redirect examination* the witness was shown Treasury

decision No. 2524, dated September 10, 1917, and then testified to the following effect:

In the ordinary course of his duties the Treasury decision would reach his office, and the regulation would be sufficient justification and explain why they crossed out the state inheritance taxes which had previously been allowed. He had already said that he adopted the policy of crossing out this deduction rather on account of this Treasury decision than the prohibition provision of the Act of 1919. He could not say whether there was another Treasury decision to the effect that the state taxes were deductible. He did not know whether it was a Treasury decision or not, but he understood it was a ruling of some kind.

JOHN V. CARCHIA, called as a witness on behalf of the plaintiff, being first duly sworn, testified to the following effect:

His present position is internal revenue agent. His specific duties are to conduct an investigation of all estates and estate tax returns. They verify the return made by the executor and in connection with that verification check up the probate court records, the records in possession of the executor, and such records as are necessary for the verification or finding of additional assets. He always makes an effort to ascertain the true tax upon the estate. If the executor happened to put in something that should not be there, it was his custom to exclude it, and determine the correct tax. At one time he investigated the estate of William E. Walker. A copy of the estate tax return (Plaintiff's Exhibit 2) was referred to him as a basis of his investigation. He had special regulations under which he made his investigations. They had a so-called Confidential Manual. The Manual of Instructions has no index and it has no reference to inheritance tax deductions. The instructions are to the effect that inheritance tax records should be examined where available.

In this instance in the Walker estate he made an investigation of the inheritance tax records in the probate court or in the Tax Commissioner's office.

GUSTAV E. RAUSCH, called as a witness on behalf of the plaintiff, being first duly sworn, testified to the following effect:

He is chief of the estate tax office in the Boston Division of Internal Revenue, and has held that position since August 1, 1929. Before that, for a year and seven months, he had been claims adjuster in the claims section of the Estate Tax Division of the Bureau of Internal Revenue at Washington, that is, from January 1, 1928 to July 31, 1929. He handled the amendment to the claim for refund, Plaintiff's Exhibit 21. The reason he thought this was the claim was because an error had been made in a prior claim of $1,000. That is also mentioned here. He did not remember any of the cases that he handled by names. If he could be shown the certificate of overassessment, then he could tell, because that would bear his initials. [Witness shown Plaintiff's Exhibit 18.] He said he prepared that certificate. He would say that he was representing the Commissioner of Internal Revenue in the regular procedure of handling claims of this kind at that time. The Commissioner, himself, did not handle these claims. His procedure was to have him handle them, and it would go through as if he had handled them, except that in this particular case, as he recalled it, there was a prior claim which was adjusted by a different claims examiner in which an error of $1,000 had been made in calculation of the tax.

The administration file was over in the general counsel's office. When this other so-called claim came in, the administration file was sent back to their unit and the case came to his desk with written instructions from the general counsel to reopen the prior claim, make adjustment to the extent of correcting this error of $1,000, and disallow the remainder.

Now that letter that he was referring to ought to be in the administration file. If it is not there it ought to be.

[At this point a letter dated August 17, 1929, to R. M. Estes, Deputy Commissioner of Internal Revenue, from G. E. Rausch, was introduced by plaintiff and marked "Plaintiff's Exhibit 22".]

He did not think that there had been any publication or ruling on which the Commissioner, since the Merrill decision, had allowed the deduction of the tax under the Act prior to the 1918 Act, in handling these claims. But he believed the matter was handled by the review committee, and they advised that either upon direction of the general counsel or solicitor general there would be no appeal from the Court of Claims ruling (in the Merrill case) and thereafter to allow the inheritance tax of Massachusetts as a claim against the estate in cases prior to the 1918 Act, in all cases where there had been a sufficient claim made for them. He was not in charge of the claims division. He was one of the adjustors there. But all the adjustors got those instructions. That ruling or policy did not go into effect until two or three months after the decision in the Merrill case in June, 1928, because it was debated as to whether there was sufficient to take it up to the Supreme Court.

EVERETT S. WHITE, called as a witness in behalf of the plaintiff, being first duly sworn, testified to the following effect:

He is an attorney at law and has been the attorney representing the executor in the case of the estate of William E. Walker. The estate tax return was prepared in his office. Mr. Carchia was one of several investigators who made an investigation of the estate. He remembered very well the investigation. Carchia made a very thorough investigation and all those facts were furnished him and shown him and the papers shown him. He showed Carchia the amount of

the Massachusetts inheritance tax that was paid on November 12, 1919.

Mr. Carchia's examination was made after that date. It extended over a long period of time, a year or two at least. He recalled the proceedings on this case in this court before, and the proceedings in the Circuit Court, and the decision of the Circuit Court in December, 1927. He was familiar with the further proceedings with the Commissioner of Internal Revenue after the case was remanded for retrial.

They asked the Commissioner to reopen the case, and his partner made an appointment with a congressman from their district for an interview with Mr. Blair [then Commissioner of Internal Revenue], which appointment was made, and Mr. Albert White, Mr. Robert M. Leach and Mr. Taylor, and he went to Washington.

They met Mr. Blair, who seemed to know something of the case except that decision. He seemed to be of the same opinion Judge Lowell was—some paper that was signed was an end of Mr. Leach's rights. They showed him the decision (of the Circuit Court of Appeals). After he read it over he made arrangements for them to see the solicitor—he thought it was Mr. Charest's office—and also made arrangements for them to use the unit—estate tax unit. And after a representative of the solicitor's department made an appointment for them to meet at the estate tax unit, the four of them who went to Washington met this Board with the representative of the solicitor's office in regard to the refund. He thought the conference in the estate tax division was around the early part of March, 1928. He would say March 6th. That is the one Mr. Leach referred to in his testimony. The conference was before a man named Estes, who sat over one side of the room behind a big desk. It was a large room. The rest of them sat around. He thought there was a table at the other end of the room. And Mr. Estes overheard something that was going on. Mr. Christy seemed to have

charge of it. Five or six did not have much to say,—listening.

He thought that they were the so-called board of review of the estate tax division or board of appeals. The first thing taken up was the opinion of the Circuit Court of Appeals in this circuit. Then after some of them still argued against that decision, the solicitor finally told them that the Circuit Court of Appeals decision was binding in the matter and that the only defense the Government had to those transfers was an alleged paper that deprived Mr. Leach of any further rights, and it had been passed upon and the court said that it was not a bar and the Government would have no defense if the case was retried in the United States District Court. And they thought it would be advisable if this Board made that refund. Mr. Leach said that he had been put to considerable expense on account of this lawsuit, that it had been tried in the District Court and had been to trial in the United States Circuit Court, that none of those expenses had ever been considered in figuring the tax. As he remembered it, Mr. Leach was asked if those fees had been paid to attorneys, additional fees. He said not yet, but that they had been incurred. They were subsequently paid.

The witness was then asked:

"*Q.* 1. And what, if anything, was said about the Massachusetts inheritance tax deduction?

Mr. SABINE. Now, may it please your Honor, it seems to me that this line of examination is irrelevant and incompetent. I hate to put in technical objections.

The COURT. I think it comes within the scope of your objection, and I will receive it subject to your objection.

Mr. SABINE. Will you allow me an exception to this?

The COURT. Yes.

Q. 2. Will you state, then, what was said at that conference on March 6, 1928? *A.* My recollection, the conversation was between you and Mr. Christy, and you said they

had never made any allowance for the state inheritance tax, and, as I recollect, he said there was a ruling that it was not deductible in spite of some court decision of some other state —that there was a Massachusetts case pending at that time, or some case pending, that might be conclusive later on."

He would not be sure of the name of the case, but thought it was the case of Merrill *v.* United States, then pending in the Court of Claims. He did not recollect that any question was raised at that time as to the additional administration expenses along with the attorneys' fees which Mr. Leach mentioned. There were some expenses incurred besides the attorneys' fees, some expenses of the court, that was taken up at the same time when he mentioned the cost of litigation.

Plaintiff offered in evidence Plaintiff's Exhibits Nos. 23 and 24, which were received without objection. Thereupon reference was made to the plaintiff's motion to amend his original declaration by substituting therefor the plaintiff's amended declaration, to wit:

"Mr. TAYLOR. I think that is about all of our case. [To Mr. Sabine:] You do not question the fact that the motion to allow this amended declaration was actually made, do you?

Mr. SABINE. Oh, no.

Mr. TAYLOR. So the allowance of the motion and the amended declaration are in?

Mr. SABINE. I understand that there is no question about that. We do not raise any question as to that.

The COURT. You do raise a question as to my authority?

Mr. SABINE. Oh, no; that is entirely within your Honor's discretion, isn't it?

The COURT. I notice in your answer you reserve the right to raise that.

Mr. SABINE. Well, I did not have anything to do with this case until ten days ago, your Honor, and I perhaps would not have put in the same form of answer."

All plaintiff's exhibits, numbered 1 to 24, both inclusive,

are incorporated herein by reference and made a part hereof as though they were herein set forth in full.

The foregoing constitute all the facts material to the issues raised by this record.

Plaintiff rested.

Defendant then rested.

At the close of the testimony defendant renewed his motion to dismiss, made at the opening of the trial, on the ground that it appeared in the record now before the court that the final payment of the tax was made on March 27, 1922; that this suit was begun on December 1, 1925, by the issuance of a summons; that the marshal's return shows service of the summons on December 3, 1925; and that the plaintiff's evidence shows that on January 16, 1926, six weeks after the commencement of the action, the Commissioner of Internal Revenue rejected the claim for refund.

The court stated that it was rather late to raise that question after the case had gone to the Circuit Court of Appeals, and ruled that the defendant had waived the jurisdictional question, overruled the motion, and granted the defendant an exception.

The defendant then renewed his motion to dismiss the declaration and the amended declaration on the ground that they failed to state facts sufficient to constitute a cause of action; that the new grounds set up in the amended declaration were never presented to the Commissioner of Internal Revenue in any claim for refund filed with him within four years after the date of the payment of the taxes; and that plaintiff is not entitled to recover anything under the declaration and the amended declaration. The court suggested that defendant file a request for a ruling that would cover the point and that he would act on that. The court overruled the motion without prejudice.

Defendant then moved to dismiss on the ground that under

the pleadings, the law and the evidence the plaintiff is not entitled to recover and that judgment must be for the defendant.

Thereupon the parties presented their requests for findings of fact and rulings of law.

PLAINTIFF'S REQUEST FOR FINDINGS AND RULINGS.

Findings.

1. On or about May 8, 1919, the plaintiff, as executor, duly filed with the Collector of Internal Revenue at Boston, the Federal estate tax return for the estate of William E. Walker, late of Taunton, Massachusetts, disclosing all items of property comprised in the said estate as of November 9, 1918, the date of death of said decedent, and thereupon paid to the said collector the sum of $37,700.68, being the total tax shown by said return. (See Stipulation No. 3.)

2. On or about February 21, 1922, as a result of notice given to him, the plaintiff paid the said Collector of Internal Revenue an additional sum of $50,000 on account of the tax upon the said estate, and said sum was accepted by the defendant as a partial payment of a proposed additional tax to be determined upon the final decision of the Commissioner of Internal Revenue. (See Stipulation No. 4.)

3. On or about the eighteenth day of March, 1922, the Commissioner of Internal Revenue determined the total tax upon the said estate to be $89,735.64. (See Stipulation No. 5.)

4. On or about the twenty-fourth day of March, 1922, the defendant, as Collector of Internal Revenue, demanded of the plaintiff a further additional tax upon the said estate in the amount of $2,034.96 together with interest amounting to $3,982.44, and the said sums in the total amount of $6,017.40 were as a result of the defendant's demand paid to the defendant by the plaintiff on the twenty-seventh day of March 1922. (See Stipulation No. 6.)

5. On or about June 20, 1925, the plaintiff, executor as aforesaid, filed with the Collector of Internal Revenue at

Boston a claim for refund in the amount of $49,634.73, "or such greater amount as is legally refundable", together with the interest thereon as provided by the statute. (See Stipulation No. 14.)

6. On or about May 28, 1928, the Commissioner of Internol Revenue reconsidered the plaintiff's said claim for refund and redetermined the total tax upon the said estate to be $49,001.29, and thereafter on or about June 20, 1928, refunded to the plaintiff the sum of $43,865.37 together with the interest thereon. (See Stipulation Nos. 12 and 13.)

7. On or about May 3, 1929, the plaintiff filed "an amendment" to his original claim for refund wherein he asserted a claim for further refund in the amount of $8,143.06, alleging therein that the Commissioner of Internal Revenue had failed to allow as deductions from gross estate under Section 203 of the Act (1) additional executor's fees, (2) additional attorney's fees, (3) additional court costs, (4) the amount paid as inheritance tax upon said estate to the Commonwealth of Massachusetts, and (5) that the total tax of $49,001.29 determined by the Commissioner as aforesaid was excessive in the amount of $1,000 by reason of the Commissioner's error in the computation of the tax.

8. In arriving at the value of the net estate upon which the said total tax was computed, the Commissioner deducted $15,654.02 on account of "executor's fee" and made no deduction on account of an additional executor's fee in the amount of $10,000 paid on or about July 3, 1928. (See Stipulation No. 8.)

9. In arriving at the value of the said net taxable estate the Commissioner deducted $3,500 on account of "attorney's fee" and made no deduction on account of additional attorney's fees paid by the plaintiff on or about July 31, 1928. (See Stipulation No. 9.)

10. In arriving at the value of the said net taxable estate the Commissioner of Internal Revenue deducted $2 on account

of "miscellaneous administration expenses" and made no deduction on account of additional court costs and expenses in the amount of $1,567.71 paid by the plaintiff on or about July 31, 1928. (See Stipulation No. 10.)

11. In arriving at the value of the said net taxable estate the Commissioner of Internal Revenue refused to make any deduction on account of the Massachusetts Inheritance Tax, which the plaintiff on or about November 12, 1919 paid to the Commonwealth of Massachusetts in the amount of $34,158.59. (See Stipulation No. 11.)

12. On or about August 29, 1929, the Commissioner of Internal Revenue reconsidered the plaintiff's claim for refund and the amendment thereto, and redetermined the total tax upon said estate to be $48,001.29, and thereafter refunded to the plaintiff the sum of $1,000 together with the interest thereon amounting to $476.86.

Rulings.

13. As a matter of law the additional executor's fee in the amount of $10,000 paid by the plaintiff on or about July 31, 1928, was and is a proper deduction in arriving at the net taxable estate under Section 203 of the Act, and the Commissioner's refusal to allow such deduction was and is erroneous and illegal.

14. In arriving at the value of the net taxable estate under Section 203 of the Act, the plaintiff was and is entitled to deduct additional attorney's fees in the amount of $20,000 paid by him on or about July 31, 1928, and the Commissioner's refusal to allow such deduction was erroneous and illegal.

15. In arriving at the value of the net taxable estate under Section 203 of the Act, the plaintiff is entitled to deduct the sum of $1,567.71 as miscellaneous administration expenses on account of expenses and court costs.

16. In arriving at the value of the net taxable estate under

Section 203 of the Act, the plaintiff is entitled to deduct the sum of $34,158.59 paid by him to the Commonwealth of Massachusetts on or about November 12, 1919, as the Massachusetts inheritance tax upon said estate.

17. The plaintiff's original claim for refund filed on or about July 20, 1925, fully complied with the purpose and intent of Section 3226 of the Revised Statutes as amended by Section 1014 (a) of the Revenue Act of 1924 and the regulations of the Secretary of the Treasury established in pursuance of said section.

18. The plaintiff is entitled to recover notwithstanding the fact that the taxes sought to be recovered in this action were not paid under protest, as provided in Section 3226 of the Revised Statutes as amended by Section 1014 (a) of the Revenue Act of 1924.

19. The defendant through his own conduct and/or that of the Commissioner of Internal Revenue waived all technical defenses in regard to (1) any insufficiency of the plaintiff's original claim for refund and (2) the alleged payment of the tax without protest.

20. Upon the law and evidence of the case the defendant is estopped to set up the technical defenses in regard to (1) the alleged insufficiency of the plaintiff's original claim for refund and (2) the alleged payment of the tax prior to June 2, 1924, without protest.

21. All doubts, if any, in regard to the disputed questions must be resolved in favor of the plaintiff and against the defendant.

22. Upon the law and evidence of the case the plaintiff is entitled to recover the sum of $7,143.06 together with the interest thereon as provided by the statute.

O. W. TAYLOR,
Attorney for Plaintiff.

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The defendant respectfully requests this Honorable Court, upon the pleadings, the agreed statement of facts, and the evidence adduced in this case, to make the following findings of fact:

1. Plaintiff, Robert M. Leach, is a citizen of Taunton, Bristol County, in the District and Commonwealth of Massachusetts. Letters testamentary were issued to him by the Probate Court of Taunton at said Taunton on December 6, 1918. Said plaintiff was thereafter and now is the qualified executor of the estate of William E. Walker, late of said Taunton, who died testate on November 9, 1918.

2. Defendant resides in Boston, Massachusetts, and from August 1, 1921 to August 31, 1925, was the duly qualified United States Collector of Internal Revenue for the Third District of Massachusetts.

3. On May 8, 1919, plaintiff, as executor, filed with the Collector of Internal Revenue for said district a federal estate tax return for the estate of said William E. Walker, deceased, and paid the collector the sum of $37,700.68, shown due by said return.

4. On February 21, 1922, defendant notified plaintiff that a large additional tax would be assessed and plaintiff paid defendant the sum of $50,000 on account of said proposed additional tax.

5. On March 18, 1922, the Commissioner of Internal Revenue determined the total tax upon said estate to be $89,735.64.

6. On March 24, 1922, defendant demanded of plaintiff the balance of said total tax ($89,735.64) as determined by said Commissioner in the amount of $2,034.96 and interest in the sum of $3,982.44.

7. On March 27, 1922, plaintiff, as executor, paid to the

defendant the total, $6,017.40, of the two sums last above mentioned.

8. In determining the value of the gross estate of the decedent, the Commissioner included certain property of the value of $404,450.74, which decedent had transferred in his lifetime, on the ground that said transfer had been made in contemplation of death.

9. In arriving at the value of the net estate upon which said total tax was computed, the Commissioner deducted therefrom $15,654.02 on account of "executor's fee".

10. In arriving at the value of the net estate upon which said total tax was computed, the Commissioner deducted from the value of the gross estate $3,500 on account of "attorneys' fee".

11. In arriving at the value of the net estate upon which said total tax was computed, the Commissioner deducted from the value of the gross estate $2 on account of "miscellaneous administration expenses".

12. In arriving at the value of the net estate upon which said total tax was computed, the Commissioner did not make any deduction for the amount paid for the inheritance tax to the Commonwealth of Massachusetts upon said estate in the sum of $34,158.59.

13. On June 20, 1925, the plaintiff filed with the defendant a claim for refund in the sum of $49,634.73, with interest amounting to $10,423.30, a total of $60,058.03, in substance on the following grounds:

(1) That said sum of $49,634.73 was erroneously and illegally collected from the plaintiff;

(2) That said gifts and transfers were not in fact made in contemplation of death and that the value of $404,450.74 of the transferred property should not have been included in the decedent's gross estate; and

(3) That the amount required to pay the true and correct Federal estate tax $43,637.54, should not have

been included in the value upon which said Federal estate tax was computed. (See paragraph 18 of plaintiff's original declaration.)

14. That on January 16, 1926, the Commissioner of Internal Revenue rejected plaintiff's said claim for refund in its entirety. (See opinion, *Leach, Executor*, v. *Nichols* (C. C. A. 1), 23 Fed. (2d) 275.)

15. That this action was commenced by the issuance of a writ on December 1, 1925, which was served upon the defendant by the United States marshal on December 3, 1925. (See transcript of record in this case, p. 4.)

16. On November 17, 1926, after a trial held before Honorable James A. Lowell, one of the judges of this court, and a jury, defendant's motion for a directed verdict was granted and on the same day the jury found for the defendant by order of the court. (Transcript of record, p. 16.)

17. Thereafter, on June 9, 1927, judgment was entered in favor of the defendant herein.

18. On June 9, 1927, Honorable James A. Lowell allowed plaintiff's petition for a writ of error. (Transcript of the record, p. 35.)

19. On December 27, 1927, the United States Circuit Court of Appeals for the First Circuit reversed the judgment of the District Court and remanded the case to that court for further action not inconsistent with its opinion (23 Fed. (2d) 275).

20. On May 7, 1929, the Commissioner of Internal Revenue determined that the value of the property theretofore determined by him to have been transferred by the decedent, William E. Walker, in contemplation of his death in the sum of $404,450.74, had been improperly included in decedent's gross estate, and thereupon determined that the total tax due thereon was the sum of $49,001.29.

21. On May 28, 1928, the Commissioner of Internal Revenue scheduled an overassessment in the sum of $43,865.37, with interest on said overassessment in the sum of $16,463,

90, a total of $60,329.27, for which last-mentioned sum a check was issued to the plaintiff herein on June 30, 1928.

22. That said sum of $60,058.03 has been duly repaid to the plaintiff.

23. That, through an error in the computation of the tax, the sum of $43,865.37 was refunded to the plaintiff as aforesaid, whereas the amount of said refund should have been $44,865.37.

24. On July 23, 1929, said error of $1,000 in the computation of said tax having been called to the attention of the Commissioner of Internal Revenue, he thereupon issued a certificate of overassessment in the sum of $1,000 with $17.38 interest thereon to this plaintiff.

25. On or about August 17, 1929, said sum of $1,017.38 was refunded to the plaintiff herein.

26. The final payment made by the plaintiff herein for the Federal estate tax upon the estate of said William E. Walker, deceased, was made on March 27, 1922. The time within which the plaintiff might file any claim for refund on account of the payment of said Federal estate tax expired on March 27, 1926, under the provisions of Section 1112 of the Revenue Act of 1926.

27. No claim for refund other than the claim filed on June 20, 1925, was filed with the defendant or the Collector of Internal Revenue, or the Commissioner of Internal Revenue prior to March 28, 1926, or prior to the commencement of this action on December 1, 1925.

28. This action was commenced on December 1, 1925, by the issuance of the writ above mentioned and the service of the summons in this action on December 3, 1925. At the date of the commencement of this action six months had not elapsed or expired since the filing of such claim for refund. Under Section 1113 (a) of the Revenue Act of 1926 plaintiff was prohibited from bringing this action.

29. Plaintiff is not entitled to recover of the defendant any

sum whatsoever on account of the Federal estate tax paid upon the estate of said William E. Walker, deceased.

CONCLUSIONS OF LAW.

1. It appearing from plaintiff's declaration (par. 18) that the claim for refund herein was filed June 20, 1925, and it also appearing from the marshal's return that this action was commenced and the summons was served on the defendant herein on December 3, 1925, prior to the expiration of six months from the date of the filing of such claim, and it further appearing that no decision was rendered by the Commissioner of Internal Revenue within that time or until January 16, 1926 (Record on Appeal, pp. 24-25), this court is without jurisdiction of this action.

Revenue Act of 1924, Section 1014 (a), (43 Stat. 343);
Revenue Act of 1926, Section 1113 (a), (44 Stat. 116);
Tucker v. *Alexander*, 275 U. S. 228;
Rock Island etc. R. R. v. *United States*, 254 U. S. 141, 143;
Maryland Casualty Co. v. *United States*, 251 U. S. 342, 353, 354;
Kings County Savings Institution v. *Blair*, 116 U. S. 200.
Nichols v. *United States*, 7 Wall. 122, 130.

2. It appearing that the final payment on account of the Federal estate tax having been made by plaintiff on March 27, 1922 (plaintiff's declaration, par. 13), and that the time within which to file a claim for refund expired on March 27, 1926, under the provisions of Section 1112 of the Revenue Act of 1926 (44 Stat. 115); and it appearing from the evidence in this action that refund in full with the interest thereon has been made to the plaintiff herein of the Federal estate tax paid upon the estate of William E. Walker by reason of the inclusion of $404,450.74 alleged as ground number (1) in paragraph 17 of plaintiff's declaration, which said ground is

also alleged as ground number 1 of paragraph 8 of plaintiff's amended declaration; and it further appearing that, under the law, plaintiff is not entitled to recover any part of the Federal estate tax upon ground number (2) of paragraph 17 of plaintiff's declaration; and it not appearing in plaintiff's declaration or amended declaration that any claim for refund on the grounds numbered (2) to (5), set up in paragraph 8 of plaintiff's amended declaration, was ever presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, this court is without jurisdiction and plaintiff's declaration and amended declaration must be dismissed and judgment rendered for the defendant.

Revenue Act of 1926, Section 1112 (a):
Red Wing Malting Co. v. *Willcuts* (C. C. A. 8), 15 Fed. (2d) 626, 634;
Tucker v. *Alexander, supra;*
Arizona Commercial Mining Co. v. *Casey*, 32 Fed. (2d) 288.

See also cases cited on page 13 of defendant's brief.

3. It appearing that the final payment on account of the Federal estate tax having been made by plaintiff on March 27, 1922 (plaintiff's declaration, par. 13), and that the time within which to file a claim for refund expired on March 27, 1926, under the provisions of Section 1112 of the Revenue Act of 1926 (44 Stat. 115); and it appearing from the evidence in this action that refund in full with the interest thereon has been made to the plaintiff herein of the Federal estate tax paid upon the estate of William E. Walker by reason of the inclusion of $404,450.74 alleged as ground number (1) in paragraph 17 of plaintiff's declaration, which said ground is also alleged as ground number 1 of paragraph 8 of plaintiff's amended declaration; and it further appearing that, under the law, plaintiff is not entitled to recover any part of the

Federal estate tax upon ground number (2) of paragraph 17 of plaintiff's declaration; and it not appearing in plaintiff's declaration or amended declaration that any claim for refund on grounds numbered (2) to (5), set up in paragraph 8 of plaintiff's amended declaration, was ever presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, plaintiff's declaration and amended declaration wholly fail to state any facts sufficient to constitute a cause of action, and plaintiff's declaration and amended declaration must be dismissed and judgment rendered for the defendant. (See cases above cited.)

4. The plaintiff having failed to comply with the statute and regulations of the Treasury Department requiring the filing of a claim for refund setting forth all facts relied upon in support of his claim clearly and under oath six months prior to the commencement of this action, and having failed to set forth the grounds now alleged in paragraph 8, numbers (2) to (5), inclusive, of his amended declaration in any claim for refund presented to the Commissioner within four years next after the payment of the tax, and having failed to begin an action on any such grounds within five years after the date of the payment of such tax or within two years after the disallowance of the part of such claim to which such suit relates, is not entitled to recover any portion of such Federal estate tax from the defendant, his declaration and amended declaration must be dismissed, and judgment must be rendered for the defendant. (See cases above mentioned.)

5. Neither the Commissioner, the Collector, nor any officer of the Government may waive statutes of limitations.

Tucker v. *Alexander, supra;*
Finn v. *United States,* 123 U. S. 227.

6. Plaintiff is not entitled to recover anything of the defendant and his declaration must be dismissed with judgment for the defendant and for his costs.

Dated February 19, 1930.

Respectfully submitted,

FREDERICK H. TARR,
United States Attorney.

WILLIAM L. MARSHALL,
Special Assistant to the United States Attorney.

The court's findings and rulings upon the foregoing requests, as contained in a memorandum accompanying the opinion, were as follows:

In Leach *v.* Nichols (Law 2700) defendant's requests for findings of fact are granted except those numbered 14, 26, 28 and 29.

Respecting request No. 14, I find that on January 16, 1926, the Commissioner of Internal Revenue notified plaintiff by letter that the claim had been rejected.

Respecting request No. 26, I find that final payment of the tax was made March 27, 1922.

Respecting request No. 28, I find as requested except the last sentence of the request.

Defendant's request for rulings of law (entitled "Conclusions of Law") are denied except No. 5, which was granted.

E. H. B.

July 24, 1930.

All the plaintiff's requests for findings of fact are granted. Also requests for rulings numbered 18 and 21.

Requests for rulings numbered 13, 14, 15, 16, 19 and 22 are denied.

Respecting request No. 17, I rule that the original claim complied with the statute and regulations so far as the claim related to the grounds specified therein, and I further rule that the amended claim complied so far as it related to the legacy and succession tax paid to the Commonwealth of Massachusetts.

E. H. B.

July 24, 1930.

Defendant, being aggrieved by the refusal of the court to grant the rulings of law requested by the defendant as herein above set forth, and being aggrieved by the granting of certain of the plaintiff's requests for rulings, and being aggrieved by the findings and rulings of the court set forth in its opinion as above set forth, now excepts to the refusal to grant the defendant's request for rulings and the granting of certain of the plaintiff's requests for rulings and the findings and rulings of the court above referred to, which were set forth in said opinion, and the defendant, therefore, brings this bill of exceptions and prays that it may be allowed.

By his Attorneys,

FREDERICK H. TARR,
United States Attorney,
J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorneys for the Defendant.

The within substitute bill of exceptions may be allowed.

O. W. TAYLOR,
Attorney for Plaintiff.

December 8, 1930. Allowed.

E. H. B.,
D. J.

EXHIBITS.

PLAINTIFF'S EXHIBIT 1.

Commonwealth of Massachusetts.

Bristol, ss. PROBATE COURT.

I, Guilford C. Hathaway, Register of the Probate Court for said County of Bristol, hereby certify that at a Probate Court holden at Taunton in and for said County, on the sixth day of December in the year of our Lord one thousand nine hundred and eighteen the last will and testament of William E. Walker late of Taunton in said County, deceased, testate,

was duly proved and allowed, and letters testamentary thereon issued to Robert M. Leach of said Taunton the executor therein named who gave bond in the penal sum of One million dollars, to the acceptance of the Judge of said Court for the due performance of said trust according to law.

I also certify that it appears by the records and files of said Court that said letters are now in full force.

In witness whereof, I have hereunto set my hand and the seal of said Court, this sixteenth day of November in the year of our Lord one thousand nine hundred and twenty-six.

GUILFORD C. HATHAWAY,

[SEAL] Register.

[On back:]

Executor Certificate of Appointment.

PLAINTIFF'S EXHIBIT 2.

Form 706

RETURN FOR ESTATE TAX

Decedent's Name Walker, William E. Date of death November 9, 1918.

Residence at time of death 38 Harrison St., Taunton, Massachusetts

The Gross Estate. 1. Real Estate.

Location (Exact legal description.)	Value on day of death.	Income accrued to day of death.
1/2 Undivided Interest in Block, 37 Main St., Taunton, Massachusetts.	$21000.00	None
Residence, 57 Berkley St. Taunton, Mass.	5250.00	"
" 57 Harrison St. " "	6800.00	"
House and Land, 16 Agawam St. Taunton, Mass.	1100.00	"
Land, Berkley St. Taunton, Mass.	900.00	"
Land, Harrison Ave., Taunton, Mass.	1600.00	"
Land, Dighton, Massachusetts.	135.00	"

1/2 Undivided Interest in Block, 220 Lisbon St., Lewiston, Me.	15000.00	None
1/2 Undivided Interest in Block, 21 Main St., Waterville, Me.	7500.00	"
Total	$59285.00	None
Grand Total, Realty and Income	$59285.00	

2. Transfers and Gifts

Includes all gifts or other transfers made within two years of decedent's death. None made in contemplation of or to take effect at decedent's death.

Name of Donee or Transferee.	Date of transfer.	Property transferred.	Value.
Robert M. Leach	Nov. 30 1917	(100 Shs. Weir Stove Co.	$80,000.
		)250 Shs. Magee Furnace Co. Inc.	25,000.
		(500 Shs. Magee Furnace Co. Inc. 1st Pref.	50,000.
		(250 Shs. Magee Furnace Co. Inc. 2nd Pref.	25.000.
Jennie E. Walker	Jan. 21, 1918.	200 shares Weir Stove Co.	160,000.
Mary W. Leach	Dec. 1917 and Jan. 1918.	(285 shs. Metropolitan Furn. Co.	42,750.
		)49 shares Atherton Furn. Co. Brockton,	24,500
		(LeBaron Atherton Note,	12,000
		Total	$419,250

3. Stocks and Bonds.

Number of shares or bonds.	Description of Designation.	Value on day of decedent's death.	Income accrued to day of death.
$2000.	Ontario Power Co. 5% Bonds 1943	$1640.	$27.23
$2200.	Am. Tel. & Tel. 41/2% Bonds 1933	1980.	18.70
$5000.	Haverhill Bldg. Trust 5% Bonds 1936	4500.	47.23
$11000.	4th Liberty Loan 4¼% Bonds	10780.	31.171
200	Shares Weir Stove Company, 134 West Water St., Taunton, Mass.	160000.	none
286	Shares Metropolitan Furniture Co. 538 Main St., Springfield, Mass.	42900.	"
99	Shares Atherton-Fowler Furniture Company, 133 Front St., Worcester, Mass.	29700.	"
60	Shares Atherton Furniture Co., 220 Lisbon St. Lewiston, Maine.	30000.	"
1	Share Atherton Furniture Co., 21 Main St., Waterville, Maine.	250.	"
1	Share Atherton Furniture Co., 35–41 Center St., Brockton, Mass.	880.	"
35	Shares Attleboro Gas Light Co., 19 Dunham St., Attleboro, Mass.	6125.	"
121	Shares American Telephone & Telegraph Company, New York City.	12221.	"
10	Shares Fuller-Hammond Co., Pfd., 60 Main St., Brockton, Mass.	800.	"
10	Shares Huntington Chambers Trust, 30 Huntington Ave., Boston, Mass.	1000.	"

10 Shares Taunton Morris Plan Co., 15 Weir St., Taunton, Mass.	1000.	none
Total	$303776.	$124.33
Grand Total, Stocks, Bonds, and Income	$303900.33	

4. Jointly Owned Property.

Description.	Value of decedent's share at death.
None	$ None
Total,	$ None
Grand Total, Decedent's Share and Income	$ None

5. Mortgages, Notes, and Miscellaneous.

Mortgagees and notes:	Value at decedent's death.	Income accrued to day of death.
W. J. & Myer Dana Mortgage dated March 10, 1915, 5%.	$75000.	$ None
W. J. & M. L. Dana Mortgage dated Sept. 24, 1912, 5%.	15000.	None
Goldstein & Antine Mortgage dated March 3, 1916, 5%.	13000.	None
J. J. Nichols Mortgage dated Feb. 19, 1916, 5 1/2%.	3500.	None
Florence A. Tracy Mortgage dated Feb. 20, 1917, 5%.	22000.	244.44
John Joseph Cooper Mortgage dated Mar. 11, 1914, 5%.	9500.	77.84
Florence B. Rivard Mortgage dated Mar. 18, 1912, 5%.	5000.	36.11
Florence A. Tracy Mortgage dated June 17, 1914, 5%.	4000.	79.44
Florence A. Tracy Mortgage dated July 1, 1914, 5%.	3000.	53.33
Catherine Leddy Mortgage dated Apr. 3, 1918, 5%.	3000.	15.00

Lizzie M. George Mortgage dated May 9, 1912, 5%.	2600.	None
N T. Staples Mortgage dated May 12, 1910, 5%.	2800.	69.22
J. J. Smith Mortgage dated July 9, 1902, 5%.	2717.18	None
Mrs. S. A. Wilde Mortgage dated Oct. 17, 1916, 5%.	2500.	7.98
A. T. Colpitt Mortgage dated Aug. 17, 1912, 5%.	2500	28.81
I. W. Hill Est. Mortgage dated May 23, 1916, 5%.	2429.92	56.36
Minnie F. Reese Mortgage dated May 31, 1913, 5%.	2000.	44.16
I/2 L. B. West Mortgage dated Jan. 2, 1905, 5%.	2000.	500.
Marie E. David Mortgage dated Mar. 28, 1916, 6%.	1650.	11.55
L. W. Brow Mortgage dated Feb. 26, 1898, 5%.	1600.	16.44
Ida E. Hervey Mortgage dated Oct. 27, 1917, 6%.	1000.	2.16
Jos. and Mary Enos Mortgage dated Dec. 16, 1916, 6%.	419.67	10.07
Julia A. Gomes Mortgage dated Dec. 30, 1913, 5%.	500.	21.52
Jos. Mello Mortgage dated July 14, 1906, 6%.	155.51	3.01
A. T. Colpitt Mortgage dated May 14, 1915, 5%.	175.	4.27
Jose deMoura Mortgage dated Nov. 27, 1915, 5%	50.	3.63
Atherton Fowler Furn. Co. Note dated Jan. 1, 1917, 5%.	9540.	10.00

Atherton-Bayard Furn. Co. Note dated Jan. 1, 1912, 5%.	13300.	14.77
LeBaron Atherton Note dated Apr. 28, 1911, 5%.	2000.	53.33
LeBaron Atherton Note dated Jan. 29, 1918, 5%.	3100.	120.98
A. S. Cook Company Note dated Apr. 22, 1913, 5%.	2500.	6.25
E. S. Beale Note dated Feb. 6, 1914, 6%.	137.09	None
L. R. Fowler Note dated May 1, 1916, 4%.	750.	53.16
L. R. Fowler Note dated May 1, 1916, 4%.	750.	53.16
Ira Murdock Note dated Sept. 28, 1916, 5%.	120.	3.70
Geo. A. Clark Note dated July 1, 1907, 5%.	100.	6.77
E. W. Conant Note dated July 17, 1903, 5%.	100.	16.25
J. C. Mello Note dated July 3, 1918, 6%.	200.	4.20
Ida E. Hervey, Note dated Nov. 26, 1917, 6%.	69[illegible]0	None
Chas. F. Shaw Note dated May 10, 1918, 6%.	231.	None
Emily G. Stanley Note dated Sept. 16, 1918, 6%.	200.	1.80
Weir Co-Operative Bank	3065.21	None
Martha's Vineyard Co-Operative Bank	1477.80	None
East Taunton Co-Operative Bank	3446.00	None
Deposits in		
Quincy Savings Bank.	1261.87	None
Attleborough Savings Bank.	1299.40	None
Taunton Savings Bank.	1693.41	None
Bristol County Savings Bank.	1864.08	None
Fall River Savings Bank.	1697.49	None
Fall River 5 Cents Savings Bank.	1748.68	
New Bedford Inst. for Savings.	1693.34	

New Bedford 5 Cents Savings Bank	1693.34	
Brockton Savings Bank.	1417.54	
People's Savings Bank of Brockton.	1396.63	
East Weymouth Savings Bank.	1640.36	
People's Sav. Bank of Worcester.	1456.66	
Worcester Co. Inst. for Savings	1243.30	
Hampden Sav. Bank of Springfield	1396.64	
Springfield 5 Cents Savings Bank.	1400.10	
Springfield Inst. for Savings.	1332.54	
Pentucket Sav. Bank, Haverhill	1389.76	
Berkshire Co. Sav. Bank, Pittsfield.	1246.30	
Bristol County Trust Co.	13220.00	
War Savings Stamps.	673.00	
Miscellaneous; cash; insurance; claims; rights; royalties; furniture; paintings, books, etc.; grain; crops, machinery; automobiles, etc.		
Connecticut Mutual Life Insurance Co.	2018.99	None
Household Furniture and Silverware.	3000.00	None
Total	$264970.14	$1629.71
Grand Total, Mortgages, Notes, and Miscellaneous and Income	$266599.85	

Deductions from Gross Estate

Funeral expense		$896.00
Administration expense:		
Executor's fee	15654.02	
Attorney's fee	3500.00	19154.02
Claims against estate:		
Debts of decedent	2728.40	2728.40
Specific exemption	50000.00	50000.00
Total		$72778.42

Recapitulation and Net Estate.

Realty	$59285.00
Gifts and transfers See Statement attached.	

Stocks and bonds	303900.33
Shares in jointly-owned property	None
Mortgages, notes, and miscellaneous	266599.85
Total Gross Estate	$629785.18
Total Deductions	72778.42
Net Estate	$557006.76

Rates and Tax Due.

Net estate, not exceeding $50,000 @ 1 per cent or 1½ per cent *2

Net estate, not $50,000–$150,000 @ 2 per cent or 3 per cent *4

Net estate, $150,000–$250,000 @ 3 per cent or 4½ per cent *6

Net estate, $250,000–$450,000 @ 4 per cent or 6 per cent *8

Net estate, *$450,000–$1,000,000 @ 5 per cent or 7½ per cent *10

Net estate, *$1,000,000–$2,000,000 @ 6 per cent or 9 per cent *12

Net estate, *$2,000,000–$3,000,000 @ 7 per cent or 10½ per cent *14

Net estate, $3,000,000–$4,000,000 @ 8 per cent or 12 per cent *16

Net estate, $4,000,000–$5,000,000 @ 9 per cent or 13½ per cent 18

Net estate, exceeding $5,000,000 @ 10 percent or 15 per cent 20

* In blue pencil.

Total Tax $[illegible],700.68.

I, Robert M. Leach, the undersigned Executor, do hereby solemnly swear that the above statement of Gross and Net Estate of William E. Walker, the above-named decedent, is in all respects true to the best of my knowledge and belief;

that letters testamentary were granted upon the said estate on the 6th day of December, 1918, by the Probate Court at Taunton, Massachusetts; and that this is a return of the estate.

ROBERT M. LEACH
Executor Weir Stove Co: Taunton Mass.

Subscribed and sworn to before me at said Taunton this 8th day of May, 1919,

Everett S. White
[SEAL] Notary Public

PLAINTIFF'S EXHIBIT 3.

TREASURY DEPARTMENT.

ET-1546-FET Washington, April 14, 1921.

Estate of William E. Walker District of Massachusetts
Tax Liability $79,759.16

Robert M. Leach, Executor, Estate of William E. Walker,
Care of Collector, Boston, Massachusetts.

Sir: A review and audit of the return on Form 706 filed for the above named estate in connection with supplemental data obtained upon investigation discloses a total tax liability of $117,459.84.

The return shows a tax liability of $37,700.68 which has been paid. The amount due is $79,759.16 which should be paid to the Collector of Internal Revenue at Boston, Massachusetts, within thirty days after receipt of this letter, as Section 407, Title IV of the Act of February 24, 1919, provides that the excess part of the tax bears interest at the rate of ten per centum per annum from the expiration of thirty days after date of notification until payment is received by the Collector.

On the second sheet of this communication is a complete summary of the returned and determined values placed upon the property and also the claimed and allowed deductions.

Following the summary is an explanation of the changes made.

2—Estate of William E. Walker Date of Death November 9, 1918

Summary

Gross Estate:	Returned (706)	Determined on Review
Realty	59,285.00	104,785.00
Gifts and transfers		571,071.74
Stocks and bonds	303,900.33	439,560.51
Mtges., notes and miscel.	266,599.85	267,375.54
Total	$629,785.18	$1,382,792.79
Deductions:		
Funeral expenses	896.00	996.00
Administration expenses:		
Exr. or Admr. fee	15,654.02	15,654.02
Attorney's fee	3,500.00	3,500.00
Miscellaneous		2.00
Debts of decedent	2,728.40	8,642.13
Charitable bequests		8,500.00
Specific exemption	50,000.00	50,000.00
Total	$72,778.42	$87,294.15
Net Estate for Tax	$557,006.76	$1,295,498.64
Total tax	$37,700.68	$117,459.84
Additional Tax Due		$79,759.16

The changes indicated below show the specific adjustments as determined by this Bureau in accordance with the Estate Tax Law.

Gross Estate

Real Estate	Returned	Determined
Land, Harrison Avenue, Taunton, Massachusetts	1,600.00	2,100.00

Undivided one-half interest in Block;		
220 Lisbon Street, Lewiston, Maine	15,000.00	50,000.00
	[In margin:	30,000]
Undivided one-half interest in Block		
21 Main Street, Waterville, Maine	7,500.00	17,500.00
	[In margin:	15,000]

Transfers

Under the provisions of the Federal estate tax law applicable thereto, the value of the following described property is included in decedent's gross estate, it having been determined after careful consideration of the evidence submitted by the executor in connection with supplemental information obtained upon investigation that such transfers were made in contemplation of death.

100 Shares Weir Stove Company transferred to Robert M. Leach	122,207.00
250 Shares Magee Furnace Company transferred to Robert M. Leach	25,000.00
500 Shares Magee Furnace Company, first preferred, transferred to Robert M. Leach	50,000.00
250 Shares Magee Furnace Company, second preferred, transferred to Robert M. Leach	25,000.00
200 Shares Weir Stove Company transferred to Jennie E. Walker	244,414.00
235 Shares Metropolitan Furniture Company transferred to Mary W. Leach	50,712.90
49 Shares Atherton Furniture Company transferred to Mary W. Leach	41,231.54

LeBaron Atherton note for $12,000 transferred to Mary W. Leach		12,000.00
Accrued interest thereon		506.30
Stocks and Bonds		
$2,000 Ontario Power Company 1943 5's	1,640.00	1,735.00
$2,200 American Tel. and Tel. 1933 4½'s	1,980.00	1,993.75
200 Shares Weir Stove Company	160,000.00	244,414.00
286 Shares Metropolitan Furniture Company	42,900.00	50,890.84
99 Shares Atherton-Fowler Furniture Company	29,700.00	64,409.40
60 Shares Atherton Furniture Company	30,000.00	37,963.60
121 Shares American Tel. and Tel.	12,221.00	13,083.13
1 Share Atherton Furniture Company, Brockton, Massachusetts	880.00	841.46
10 Shares Huntington Chambers Trust	1,000.00	650.00
Mortgages, Notes and Miscellaneous		
Deposit Weir Co-Operative Bank	3,065.21	2,644.11
Deposit East Taunton Co-Operative Bank	3,446.00	3,421.00
Deposit in Taunton Savings Bank	1,693.41	1,717.48
Deposit in Bristol County Savings Bank	1,864.08	1,873.16
Deposit in New Bedford 5 Cents Savings Bank	1,693.34	1,699.69
Deposit in Brockton Savings Bank	1,417.54	1,421.98
Deposit in Peoples Savings Bank of Worcester	1,456.66	1,474.68
Deposit in Worcester County Institute for Savings	1,243.30	1,263.33
Deposit in Springfield Institute for Savings	1,332.54	1,354.01
Deposit in Pentucket Savings Bank	1,389.76	1,394.97

Deposit in Berkshire County Savings Bank	1,246.35	1,267.70
Deposit in Bristol County Trust Company	13,220.28	14,313.65
War Savings Stamps	675.20	673.60

Deductions	Determined	Returned
Funeral Expenses	996.00	896.00
Miscellaneous administration expenses	2.00	
Debts of decedent	8,642.13	2,728.40
Charitable public and similar bequests	8,500.00	
Difference between net estate returned and determined, to balance	738,491.88	

Funeral expenses are deducted in the amount which it appears was expended in that behalf.

Deduction is made for miscellaneous administration expenses of the amount which it appears has been paid.

Debts of decedent are deducted in the amount for which it appears decedent was actually liable at date of death including Federal and State income taxes accrued to that date.

Examination of the report of the investigating officer together with the proofs submitted by the estate, discloses that the above named estate is entitled to the following deductions under Section 403 (a) (3) of the Revenue Act of 1918:

Board of Trustees of the First Methodist Episcopal Church, Taunton, Mass.,	$5,000.00
New England Home for Little Wanderers, Boston, Mass.,	1,000.00
Taunton Boys' Club Association,	1,000.00
Taunton Visiting Nurse Association,	500.00
Associated Charities of Taunton,	500.00
Local Branch of the Salvation Army, Taunton, Mass.,	500.00
	$8,500.00

All questions relating to the procedure concerning payment, abatement or refund of the additional tax herein disclosed must be taken up with the Collector at Boston, Massachusetts.

Respectfully,

L. S. RUDDICK,

HC Acting Deputy Commissioner.

PLAINTIFF'S EXHIBIT 4.

UNITED STATES OF AMERICA.

Treasury Department, April 19, 1926

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed are true copies of Claim for Abatement of $79,759.16, (with affidavits attached), filed by Robert M. Leach, Executor of the Estate of William E. Walker, Taunton, Massachusetts; Copy of letter dated March 18, 1922 to Robert M. Leach, Executor, Estate of William E. Walker, Boston, Massachusetts, from D. H. Blair, Commissioner of Internal Revenue, on file.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury;

McKENZIE MOSS,

[SEAL] Assistant Secretary of the Treasury.

TREASURY DEPARTMENT U. S. INTERNAL REVENUE

CLAIM FOR ABATEMENT TAXES ERRONEOUSLY OR ILLEGALLY ASSESSED

May 13 1921 3rd Dist. Mass. Estate Tax Div
Date of filing to be plainly stamped here
Office of Internal Rev May 23 1921

State of Massachusetts

County of Bristol ss:

(Name of claimant.) Estate of William E. Walker—Robert M. Leach Executor

(Address of claimant; give street and number as well as city or town, and State.) Harrison Street Taunton Mass.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Executor of Estate
2. Character of assessment or tax Estate Tax
3. Amount of assessment Additional Tax $79,759.16
4. Amount now asked to be abated $79,818.91 79,759.16

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

That the taxes were unjustly assessed, being based upon values greatly in excess of the real value with the result that the tax upon the Estate is excessive in amount as is more fully set forth in the attached affidavits and that gifts not taxable by law were unjustly, erroneously or illegally included in the Estate.

I Hereby request a Hearing before the Committee on Appeals & Review at Washington in regard to All Matters connected with the Assessment of the Additional Inheritance Tax in the Estate of William E. Walker in the event that the amount of assessment now asked to be abated is not abated.

ROBERT M. LEACH Executor.

Sworn to and subscribed before me this 7th day of May, 1921. Everett S. White Notary Public.

My commission expires December 31, A. D. 1925

Certificate of Assessment

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name and address. Walker, Wm E

Character of Assessment or Article Taxed. Estate
Period Covered by Assessment. Tax
Year. 1921 Month. Apr Page. 7 Line. 9 Amount. 79,-759.16
No Previous Claim C L Mansury
A M S Assessment Clerk, Commissioner's Office.

Abatement Order No. ET-A-72

District Mass E. T. (Nature of tax.)
Claimant Estate of—William E. Walker Address
By—Robert M. Leach, Executor.

Examined and submitted for action Mar 14 1922.

Committee on Claims,
McKenzie Moss.
J. C. Rogers

Claim examined by—L S P. N W R Claim approved by —C U J Actg Chief of Divison.
Amount claimed, $79,759.16 Amount allowed, $27,724.20
Amount rejected, $52,034.96

Estate of William E. Walker, Taunton, Mass.

I, Robert M. Leach, of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that I am Executor of the Will of the late William E. Walker of said Taunton; that I was familiar with Mr. Walker's investments and the values of the same during his lifetime, at the time of his death and since his death and I know that the values placed by the Government upon the several items mentioned below are excessive and at no time could these different items be sold for anywhere near the Government valuation, and that the values I returned were fair values; that the Government taxed gifts and transfers as mentioned below erroneously and illegally as I am informed that gifts and transfers have to be made in contemplation of death and these were not.

1. Land Harrison Avenue Taunton Massachusetts. Returned $1600. Determined $2100. The lot was 60 x 150 feet and $25. per front foot is a fair value. $2100. is excessive.

2. Undivided one-half interest in Block 220 Lisbon Street, Lewiston, Maine. Returned $15,000. Determined $50,000. The whole property was assessed in 1918 for $30,000., land $14,000. building $16,000. The whole property cost $30,000. This property rents for $5,000. the owners pay outside repairs taxes and insurance. This property is located some distance from Main Street in a City of about 30,000. population and property increases in value the nearer it is to Main Street. I was surprised to find that real estate men valued this property at $50,000. or one half at $25,000. and I annex affidavits of reliable real estate men and chairman of board of assessors—but a valuation of $50,000. for a half interest is so excessive that it is an absurd valuation.

3. Undivided one-half interest in Block 21 Main Street, Waterville, Maine. Returned $7,500. Determined $17,500. In 1918 this property was assessed for $15,000. The land was assessed for $6,000. and the buildings for $9,000. Waterville is a City of about 13,000 population. The cost of this building and land was $15,000, and it was assessed for that, it rents for $2000., the owners paying taxes repairs and insurance. I have asked the best real estate men to value the property and they value the property at $25,000. which is a big valuation—yet the Government value one-half at $17,500. which is clearly excessive.

4. Transfers. Returned at Nothing. Determined $571,071.74 These transfers were not made in contemplation of death, some were made for services and some were pure gifts which are not by law taxable, the details I have previously given by affidavits. The determining these gifts as taxable is illegal and erroneous, and even if they were taxable by law the values are excessive.

Stocks and Bonds.

5. 200 Shares Weir Stove Company. Returned $160,000. Determined $244,414.00 80% is all that this Company c pay with safety and $800.00 a share would yield 10% duri years of prosperity. In determining the value of the stoc it should be borne in mind that the success of this Compa depends wholly on the efforts of two men. If those m were removed from this business there would be nobo among the stockholders or among the employees who wo be able to conduct this business successfully. The Co monwealth of Massachusetts valued this stock for inheritan tax purposes at $800.00 a share after a thorough investig tion. It would be absolutely impossible to sell this stock as to realize $800.00 a share.

6. 286 Shares Metropolitan Furniture Company. Return $42,900. Determined $50,890.84 The par value of t stock was $50.00 and it sold for $75.00 a share. These sa represented approximately its true value, and, although returned these shares at a very high valuation, the Gove ment has even increased that value, so that their valuati is greatly in excess of what this stock could be sold for. F that reason it is an unjust valuation.

7. 99 Shares Atherton-Fowler Furniture Company. R turned $29,700. Determined $64,409.40 In this case t Government has ignored the sale price in determining t valuation. No sales have been over $300.00 a share. $300.00 a share this stock would yield 10% in prospero times. The Government valuation is over twice the valu the stock could be sold for and the yield as an investm would be less than Government Bonds.

8. 60 Shares Atherton Furniture Company. Return $30,000. Determined $37,963.60 In the Company's most su cessful years, on the valuation returned, the stock would yi 10%, and this stock would not sell for over $500.00 a sha

The Government has fixed the valuation according to the earnings over a period of years and according to its assets and liabilities. This is another instance where the formula does not give an equitable result.

9. 121 shares American Tel. & Tel. Returned $12,221.00. Determined $13,083.13 This is a listed stock and returned for what it could have been sold for at the time of Mr. Walker's death. The determined value is above the market and excessive.

10. Deposit in Bristol County Trust Company. Returned $13,220.28. Determined $14,313.65 The amount returned was the amount of money Mr. Walker had on deposit at the time of his death according to his check book, there being some checks out which were not cashed at the time of his death, the Government did not consider the checks that had been given but not cashed in determining their value and so included money that did not belong to Mr. Walker, this is obviously incorrect and the amount is excessive.

I hereby ask for a Hearing before the Committee of Appeals & Review in Washington in regard to All the Gifts that have been taxed and All the Other Items mentioned in this Affidavit.

ROBERT M. LEACH.

Commonwealth of Massachusetts.

Bristol, ss. May 7, 1921.

Then personally appeared, before me, the above-named Robert M. Leach known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him. Everett S. White

Notary Public

My commission expires December 31, A. D. 1925.

Affidavit of Henry N. Hopkins in Relation to the Health of the Late William E. Walker of Taunton, Massachusetts.

I, Henry N. Hopkins of Taunton, Massachusetts, being now retired except that I am a Director and Member of the Security Committee of the Taunton Co-Operative Bank, and look after some property that I own, on oath depose and say that I have been a resident of Taunton for a great many years and that I have been personally acquainted with William E. Walker for forty years and intimately acquainted with him the latter part of his life. Some years ago he retired from active business affairs as he thought he would relax from business cares and leave it to the younger generation to look out for it. After Mr. Walker's retirement from his business he used to be at the Civil War Veterans' Club practically every day, and I saw him there personally on an average of at least three times a week at the club. He used to come down and play games with other Civil War Veterans and he seemed to enjoy coming there and meeting his comrades and playing cribbage or other games with them. At different times I have seen him leave the Club and say that he was going down to the Weir Stove Company. Of course I do not know how long he stayed at any of his particular visits to the Weir Stove Company. I do know that he spent a good deal of his time at the Club.

He was a man that always took good care of himself and always appeared to enjoy good health, and, after his retirement from active business, he lost his worried look. I never heard him complain of having any disease, or of feeling badly. He came to the Civil War Veterans' Club regularly right up to the time that he received the shock that caused his death, except there was one week or two that he did not come to the Club. I never observed anything, or heard him

say anything that would lead me to believe that he expected to die. Apparently he expected to live for many years.

I am not related to Mr. William E. Walker or any of his beneficiaries, and have no personal interest in his estate. I knew him well as a friend and as a fellow comrade in the G. A. R.

Witness my hand this seventh day of October, 1920.

HENRY N. HOPKINS.

Commonwealth of Massachusetts.

Bristol ss. Taunton, October 7, 1920.

Then personally appeared, before me, the above-named Henry N. Hopkins, known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Albert C. Francis
Notary Public
My commission expires Feb. 7, 1924.

Affidavit of Oscar A. Hillard in Relation to the Health and Last Illness of William E. Walker, late of Taunton, Massachusetts.

I, Oscar A. Hillard a resident of Taurton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that I am a clergyman and a Civil War Veteran. I knew William E. Walker for many years and knew him intimately for the last seven years of his life.

I went to Grand Army Conventions and meetings in Boston with him and I frequently preached at his request in Dighton and Rehoboth, and he always went with me. I saw him at the Civil War Veterans' Club very often and he played cribbage and auction pitch and he could hold his own with any of them. He walked down to the Club, and he said he walked to the factory because he worked in the factory once himself and he did not want his men in the shop to feel that he was above them.

In the Labor Day Parade 1918, William E. Walker marched from Washington Street to the Taunton Green and he helped sustain one of his comrades during the march. A moving picture was taken of this parade.

William E. Walker suffered during his imprisonment at Andersonville Prison during the Civil War. Afterwards he worked hard for over forty years before he retired from active business affairs. He was a careful and considerate man, he did not gormandise, his mental faculties keen and his judgment was excellent. He enjoyed his living very much indeed, and he was very conscientious and would say "that was what was put into me when I was a boy."

William E. Walker appeared the same the last seven years of his life—to my mind his last illness grasped him like an octopus would one within his reach. His illness came suddenly and I could hardly believe that it would prove fatal until I heard of his passing away.

OSCAR A. HILLARD

Commonwealth of Massachusetts

Bristol ss. Taunton, October 9, 1920.

Then personally appeared, before me, the above-named Oscar A. Hillard known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White

Notary Public.

Affidavit of Dr. Byron L. Dwinell in Relation to the Health and Last Illness of William E. Walker late of Taunton, Massachusetts.

I, Byron L. Dwinell, a resident of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that the late William E. Walker has been a patient of mine for ten to fifteen years. I had also been his family physician during that time and most of my profes-

sional services to the family were required for the benefit of Mrs. Walker. Mr. William E. Walker never had any particular disease, over work and worry of business being his principal troubles up to his last illness.

The last part of 1918 Mr. William E. Walker was taken with cerebral hemorrhage and had an illness of a few weeks only, dying on November 9, 1918. Prior to this attack Mr. William E. Walker was about and seemingly as well as a man of his age.

I was the only attending physician that Mr. William E. Walker had during his last illness and for some years prior thereto.

I am a graduate of Boston University Medical School, and have been in practice since 1878.

B. L. DWINELL M. D.

Commonwealth of Massachusetts.

Bristol ss. October 4, 1920

Then personally appeared, before me, the above-named Byron L. Dwinell M. D. known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White,
Notary Public.

Filed after conference at office of Revenue Agent.

Supplemental Affidavit of Byron L. Dwinell in Relation to the Health and Last Illness of William E. Walker, late of Taunton, Massachusetts.

I, Byron L. Dwinell, a resident of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that in addition to what I stated in my Affidavit of October 4, I wish to state that the late William E. Walker had no disease, that I called on Mrs. William E. Walker frequently at Mr. Walker's request, and at different occasions I treated Mr. Walker for indigestion. The headaches that he

had were only those that accompanied indigestion and were of no consequence.

There was no appreciable change in Mr. Walker's appearance during the last five years of his life until his last illness. His habits were the same and the condition of his health was the same. Nothing ever appeared that would indicate to me that he might die within a year or two. The only thing that I ever cautioned him about was in relation to his worry over business affairs.

His voice was the same up to until about two weeks of his death when it began to weaken with the rest of his body. I have never told a Government Agent or anybody else that Mr. Walker began to grow weaker two years before he died, or that his voice began to fail him two years before he died, and that was certainly not the case. And anybody that says that Mr. Walker showed a marked failure two years before he died, and says that I ever said so is, putting it mildly, mistaken.

BYRON L. DWINELL M. D.

Commonwealth of Massachusetts

Bristol ss. October 20, 1920

Then personally appeared, before me, the above-named Byron L. Dwinell M. D. known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White,
Notary Public.

My commission expires December 31, A. D. 1925.

Affidavit of Albert R. White in Relation to Gifts of William E. Walker, late of Taunton, Massachusetts, to Robert M. Leach, Jennie E. Walker, and Mary W. Leach.

I, Albert R. White, a resident of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that I was personally acquainted with the late William E. Walker for some twenty-five years prior to

his death; that for many years prior to his death, I acted as his personal attorney in many of his business transactions and as Attorney for the Weir Stove Company and the Magee Furnace Company, Inc., of said Taunton, and was intimately acquainted with Mr. Walker's personal affairs and the relationship between himself and his immediate family. Mr. Walker started with nothing and by diligent attention to business became one of the leading manufacturers of the City. He was noted far and wide for his generosity, both to his family and deserving charities. When he began to make money his pocketbook was always open to all charitable projects and to his needy friends and relatives. He consulted me in November, 1917, in relation to some gifts he proposed to make to his son-in-law, Robert M. Leach, to his wife, Jennie E. Walker, and his only daughter, Mary W. Leach. One of the purposes of the interview was to find out in relation to the stock transfer tax existing in the State of Massachusetts for transfer of shares of stock between people, and for the further purpose of getting advice as to how to make valid gifts to his family. I explained the stock transfer tax to him and I explained to him his legal rights to make gifts to members of his family, which were binding provided he made actual transfers and delivered possession of the property. During the course of the interview he told me that he intended to make some big gifts as a surprise to his family; that he himself would then have ample money left for all that he would ever need, and he further stated that he had more money than any one man ought to have and he was willing to divide his up. He spoke highly of his son-in-law, Robert M. Leach, and said he was going to give him 100 shares of the Weir Stove Company Stock in payment for the personal work and attention he had given to Mr. Walker's personal affairs and in recognition of his splendid services as Sales Manager of the Weir Stove Company, Mr. Leach having trebled the business by his skilful handling of the

sales force and marketing the product, the gift to be a Christmas Gift for the year 1917.

I acted as Counsel at the time that the Magee Furnace Company, Inc., was purchased and suggested to Mr. Walker that I thought it was a good business venture. He said he was perfectly willing to put money into it for Mr. Leach, but he did not care to be active himself. I suggested that it was necessary to have his backing and prestige because the Company would need this for the purpose of borrowing money, and suggested that he take the stock in his own name pending the time when the Company was on a firmer foundation and then he could transfer it to his son-in-law at his leisure. At the time of the interview in November, 1917, Mr. Walker bought up the holdings in the Magee Furnace Company, Inc., which were in reality his son-in-law's, and suggested that that was a good opportunity to transfer those shares, and I advised him to do it, which he did. He went down to his vault in the Bank, which is in the same building that my office is located, and brought up the certificates for the purpose of transferring them on the back.

Mr. Walker had been for a number of years in excellent health. He used to go down town every day and sometimes went to his place of business and appeared like a man who had many years before him. He was stricken with a cerebral hemorrhage early in the Fall of 1918 from which he never rallied. His death was entirely unexpected. We all thought that he had many years to live. At this same interview, he said he was going to give his wife 200 shares of the Weir Stove Company Stock for a Christmas Gift, and that he was going to give his holdings in the Metropolitan Furniture Company and the Atherton Furniture Company of Brockton and a note for twelve thousand dollars, given him by one LeBaron Atherton, to his daughter, Mary W. Leach, as her Christmas Gift, and he apparently carried out his intentions. He was very fond of his wife and daughter,

and, knowing him, gifts of this character did not in any way seem remarkable. He was the most upright man, one of the leading citizens of the city, and had no thought of any possible death, but made the gifts out of the goodness of his heart to his family. At the time he made the transfers he retained in his own possession 60%, or more, of his estate, which is being administered now by his son-in-law as Executor.

Witness my hand this eighth day of May, 1919.

ALBERT R. WHITE.

Commonwealth of Massachusetts.

Bristol ss. Taunton, May 8, 1919.

Then personally appeared, before me, the above-named Albert R. White, known to me to be the person he represented himself to be, and made oath to the truth of the statement above subscribed by him.

Everett S. White,
Notary Public.

My Commission Expires December 31, 1925.

Affidavit of Robert M. Leach, Executor of the Will of William E. Walker, late of Taunton, Massachusetts, in Relation to Gifts made within Two Years of the Decedent's Death.

I, Robert M. Leach, of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that the late William E. Walker, of whose will I am Executor, was my wife's father; that he was a lifelong resident of said Taunton, living on the same street and in the next house to me; that he died November 9, 1918; that at his death he was the Treasurer of the Weir Stove Company of said Taunton; that I was the Sales Manager of said Weir Stove Company at that time; that for ten years preceding Mr. Walker's death I was his personal representative to the

corporation and transacted all his personal business myself, having a General Power of Attorney duly recorded in said Bristol County; that Mr. Walker had been retired for several years prior to his death, did very little work, or paid very little attention to business, although he was in the best of health up to shortly before he died. His death was caused by cerebral hemorrhage and was unlooked for and unexpected. Mr. Walker was a little over seventy years old at the time of his death. He came of a long lived family, his father and mother having lived to very old age, and he had every expectation up to the time he had his cerebral hemorrhage of living a number of years. I enjoyed his full confidence, attending to all his personal affairs, even to the paying of his household help. Attention to his personal affairs took a great deal of my time, which would otherwise have been leisure time, and it was agreed by Mr. Walker that I should be amply paid for this additional work for several years prior to his decease. Finally, in November, 1917, Mr. Walker transferred to me 100 Shares of the Capital Stock of the Weir Stove Company as part payment for my past services for him and for future services to be rendered. At the same time he transferred to me 250 Shares of the Magee Furnace Company, Inc., Common Stock, of which company I had served as Treasurer and did continue to serve as Treasurer until I went into the United States Army. He also transferred to me 500 Shares of the First Preferred Stock of said Magee Furnace Company, Inc., and 250 Shares of the Second Preferred Stock of the Magee Furnace Company, Inc. The par value of all of the stock above described was One Hundred Dollars per share. The circumstances of transferring the Magee Furnace Company, Inc., Stock were as follows:—

In 1915, in February, the Magee Furnace Company was in the hands of Receivers and was offered for sale. I was desirous of acquiring the Company and Mr. Joseph L. Anthony of said Taunton and myself made the necessary arrangements

for purchasing the old company and for re-organizing a new one. At that time Mr. Walker said he would furnish me the money, but did not care to be identified with the venture himself for the reason that he had practically retired from active business. As the Magee Furnace Company, Inc., needed financial backing and as I was without the necessary means to back it, I induced Mr. Walker to take the stock in his name, take a seat on the Board of Directors for awhile so that the Company could have the advantage of his financial prestige and credit for raising borrowed money. It was agreed that all the shares subscribed for by Mr. Walker were to be turned over to me at any time I called for them, but it was my purpose not to call for them until the Company was on a firmer financial basis. At the time I received the shares of the Weir Stove Company, I felt the Magee Furnace Company, Inc., could go ahead all right without Mr. Walker's financial backing and requested the transfer to me at that time, which Mr. Walker made. Mr. Walker at no time made either gift to me with any expectation that he was to die, or with any desire to eliminate estate taxes. It was a pure gift between us founded on the considerations above mentioned. I was personally without financial means and Mr. Walker took this means of reimbursing me and putting me on my feet.

In November, 1917, Mr. Walker stated to me that he wanted to make some handsome Christmas Presents both to his wife, Jennie E. Walker, of said Taunton of whom he was very fond, and his only daughter, Mary W. Leach, my wife. We talked the matter over and he decided that he would give Mrs. Walker for her Christmas Gift, 200 Shares of the Weir Stove Company Stock, and that he would give his daughter, 285 Shares of the Metropolitan Furniture Company and 49 Shares of the Atherton Furniture Company of Brockton and a note for Twelve Thousand Dollars given him by LeBaron Atherton in payment of a stock purchase. These securities were immediately transferred in November, 1917, to the

above named Jennie E. Walker and Mary W. Leach and the certificates representing the gifts handed over at Christmas, 1917. The gifts to the daughter and wife were Christmas Presents and were not made in anticipation of death or with any thought that death was liable to overtake Mr. Walker. The new certificates were signed by the President of the Corporation shortly after Christmas as soon as we could get them into his hands.

Up to the very day that Mr. Walker was stricken with the cerebral hemorrhage, he used to go to his club every day and quite often to the Factory for a short time, and was apparently in the very best of health.

Witness my hand this eighth day of May, 1919.

ROBERT M. LEACH.

Commonwealth of Massachusetts.

Bristol ss. Taunton, May 8, 1919.

Then personally appeared, before me, the above-named Robert M. Leach, known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White

[SEAL] Notary Public

My Commission Expires December 31, 1925.

Affidavit of Joseph L. Anthony in Relation to Gifts of William E. Walker, late of Taunton, Massachusetts, to Robert M. Leach, Jennie E. Walker, and Mary W. Leach.

I, Joseph L. Anthony, of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that I am the Vice-President and General Manager of the Weir Stove Company; that in November, 1917, William E. Walker was its Treasurer and a Director. He was a very liberal man and very fond of his son-in-law and his wife and daughter; that he appeared to be in the best of health with many years before him. He told me that he was going to

make some gifts to his wife and daughter as Christmas Presents and give 100 Shares of the Weir Stove Company Stock to his son-in-law, Robert M. Leach, in recognition of his faithful servites over a period of ten years in Mr. Walker's personal interests. Mr. George E. Wilbur, the President of the Weir Stove Company, an elderly man, had some years previously transferred to me 100 Shares of his holdings in the Weir Stove Company that I might become interested in the Company and an officer of it, and it seemed entirely fitting for Mr. Walker to make a similar transfer to his son-in-law for his faithful services.

Mr. Leach and I conceived the idea of buying the old Magee Furnace Company, Inc., and organizing a new company. Mr. Walker did not want to go into it, but was perfectly willing to loan us the use of his name for the purpose of borrowing money, and I am familiar with the fact that the shares of stock he took in his own name were always intended for his son-in-law; that he never intended to hold them, and his transfer of them in November, 1917, was simply in consequence of a pre-arranged plan to give them to him two years before.

When William E. Walker subscribed for the Magee Furnace Co., Inc., Stock, he told me that the stock was to be Robert M. Leach's; that he, Mr. Walker, had no further interest in large business affairs, but wanted to assist his son-in-law to become a manufacturer himself, and therefore he was going into this Magee Furnace Company, Inc., venture for him.

Witness my hand this eighth day of May, 1919.

JOSEPH L. ANTHONY

Commonwealth of Massachusetts.

Bristol, ss. Taunton, May 8, 1919.

Then personally appeared, before me, the above-named Joseph L. Anthony, known to me to be the person he repre-

sented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White
Notary Public.
My Commission Expires December 31, 1925.

Affidavit of Seth L. Cushman in Relation to Gifts of the late William E. Walker, late of Taunton, Massachusetts, to Robert M. Leach, Jennie E. Walker, and Mary W. Leach.

I, Seth L. Cushman, of Taunton, Massachusetts, being formerly President of the Bristol County National Bank of said Taunton, of which Bank the late William E. Walker was a Director for many years, on oath depose and say that I was personally and intimately acquainted with William E. Walker for more than forty years. He retired from the Board of Directors from my Bank at about the time, as I remember it, that he gave up business activities on the ground that he did not want the care of business, but wanted to throw off all cares and lead a quiet life for the remainder of his days. He was in good health for years up to the time he was stricken with a shock from which he died. In personal appearance, up to the very time of his shock, he had the look of a man who enjoyed good health and he looked much younger than his actual years, walked with an active step, and had the appearance of a man who had many years to live. His shock was a distinct surprise to the community; in fact, no one that I have talked with ever heard Mr. Walker say, during the last few years of his life, anything which would indicate that he was in other than good health; in fact, better than a man of his years would ordinarily be in. As I remember it, when he retired from the Board of Directors from my Bank, his son-in-law, Robert M. Leach, represented him on the Board and continued to do so until the Bank was finally absorbed by the Taunton National Bank.

I know personally that Robert M. Leach attended to Mr. William E. Walker's affairs down to the most minute details and rendered him most efficient and faithful service for which I have no doubt, knowing the late Mr. Walker, that he was perfectly willing and expected to pay for, as he was a man who did not want something for nothing and always glad to pay his way and more too.

I am not a relative of either Mr. Walker, or his wife, or daughter, or of Mr. Leach. I have no personal interest in the Estate in any way, shape, or manner, and am giving these facts as I remember the circumstances for what they may be worth.

Witness my hand this seventh day of October, 1920.

SETH L. CUSHMAN.

Commonwealth of Massachusetts.

Bristol ss. Taunton, October 7, 1920.

Then personally appeared, before me, the above-named Seth L. Cushman, known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White

Notary Public.

My Commission Expires December 31, 1925.

Supplemental Affidavit of Albert R. White in Relation to Gifts of the late William E. Walker, late of Taunton, Massachusetts, to Robert M. Leach, Jennie E. Walker, and Mary W. Leach.

I, Albert R. White, a resident of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that I was personally acquainted with the late William E. Walker for some twenty-five years prior to his death; that for many years prior to his death I acted as his personal attorney in many of his business transactions and as Attorney for the Weir Stove Company and the Magee

Furnace Company, Inc., of said Taunton, and was intimately acquainted with Mr. Walker's personal affairs and the relationship between himself and his immediate family.

With further reference to the gifts made to Robert M. Leach: at the time I organized the Magee Furnace Company, Inc., in 1915, the question of Mr. Leach's share in the venture was discussed by myself and Mr. Walker; Mr. Walker at the time suggested that he himself was not interested in the acquisition, or operation of the Magee Furnace Company, Inc., but that his son-in-law was younger and able to take on additional burdens and was at liberty to acquire a big interest in this company for himself; Mr. Walker stated that he was personally glad to contribute whatever Mr. Leach wanted for his, Mr. Leach's, share in the venture in partial recognition of the services that Mr. Leach had rendered for him for years in the management of his personal affairs; Mr. Leach at the time also stated that he expected to receive pay for the services he had rendered Mr. Walker, but that he wanted Mr. Walker to subscribe for the shares of stock in this company in his own name to make him a substantial stockholder and in the eyes of the banking interests which were to be called upon for loans, and also to have him on the Board of Directors, so that the Company could have the use of his name, both for endorsement of notes and for the prestige it would bring the Company; Mr. Walker readily agreed to this, and it was left with Mr. Leach to have the shares transferred from Mr. Walker to Mr. Leach whenever Mr. Leach should call for them; it was a plain, simple transaction, perfectly natural, made with my full knowledge and under my directions. I believed at the time this transaction took place, that, when the shares were transferred to Mr. Leach, and still believe, that such a transaction is within the Law, was made for a good consideration, and that Mr. Walker had no idea that he was to die for years; in fact, the opposite was perfectly apparent. He relinquished his heavy

business cares at a time in life when most sensible men do with the idea that it would materially lengthen his days to throw the burdens of his business on younger competent shoulders so that he might enjoy a well earned leisurely old age.

Mr. Walker enjoyed to the fullest his leisure. He made a practice of going to the Factory of the Weir Stove Company occasionally, not for the purpose, however, of entering into the management of the company, but more to see his old employees, many of whom started with him in business. I do not recall that I ever saw him but once at a Directors' Meeting where important business was to be transacted, although of course it is possible that he may have attended some of the meetings, as I only attended such as were important. I remember distinctly on one occasion, after a long session, of remarking to Mr. Leach that he seemed to have a big burden of responsibility to carry for Mr. Walker. This conversation took place in the Weir Stove Company Office, and he said he knew it, but that Mr. Walker had said to him he would be well paid for all he had done, so that I am thoroughly satisfied that Mr. Walker, from his conversations to me, expected to pay Mr. Leach well and that Mr. Leach expected compensation from Mr. Walker for what he had done.

In Relation to the Will dated the fourth of December, 1917: this Will was drawn with almost the identical ideas, with the exception of a few minor changes, such as additional bequests to charities, etc., like one that Mr. Walker had had drawn some years previously and was not drawn in any immediate contemplation of death, because, at the time of its execution, which was the day of its date, Mr. Walker was in excellent health and spirits too. For instance, two of the charities mentioned in the Will of 1917, namely, the Taunton Visiting Nurse Association and the Taunton Boys' Club, were not in existence at the time he had made the Will previous

to the one of 1917. The previous Will I destroyed after the execution of the new one, as is customary on the question of revocation.

Mr. Walker told me himself, in the course of his life he made several Wills after he began to accumulate some property. I am only familiar, however, with the one I drew and the one executed previous to that, which I did not draw but used as a basis of the 1917 Will.

Witness my hand this seventh day of October, 1920.

ALBERT R. WHITE.

Commonwealth of Massachusetts.

Bristol ss. Taunton, October 7, 1920.

Then personally appeared, before me, the above-named Albert R. White, known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Albert C. Francis
Notary Public.

My Commission Expires Feb. 7, 1924.

Supplemental Affidavit of Robert M. Leach, Executor of the Will of William E. Walker, late of Taunton, Massachusetts, in Relation to Gifts made by the late William E. Walker.

I, Robert M. Leach, of Taunton, in the County of Bristol and Commonwealth of Massachusetts, on oath depose and say that the late William E. Walker, of whose Will I am Executor, was my wife's father; that he was a lifelong resident of said Taunton, living on the same street and in the next house to me; that he died November 9, 1918; I do hereby make this supplemental affidavit in order to more fully explain the question of the transfer of shares of the Weir Stove Company and the Magee Furnace Company, Inc., by Mr. William E. Walker to me. Years ago the late George E. Wilbur transferred to Joseph L. Anthony, who is now the President

of the Weir Stove Company, at that time he was the Superintendent, One Hundred Shares of the Capital Stock of the Weir Stove Company. This transfer was made in recognition of Mr. Anthony's faithful services to the Company. At about the time of this transfer, Mr. Walker told me that he was going to give me One Hundred Shares to put me on a same footing with Mr. Anthony. He said that I should have something more than the salary and that as Mr. Anthony was in no way related to Mr. Wilbur that the least he could do was recompense me to the same extent for the work I had performed for Mr. Walker, as set forth in the previous affidavit. I of course expected to be paid. I did not, however, urge Mr. Walker to make the transfer to me at any specific time, believing that he was the best Judge of when that should be done. I expected, however, that it would have been done before the transfer was actually made, because I felt that, in view of all the circumstances, I earned this recognition. In relation to the Magee Furnace Company Stock, there was never any talk, or suggestion, between Mr. Walker and myself that my interest in this concern was purchased by Mr. Walker as a loan, or that it was cash advanced in any other way except as a reward for my long and faithful service. This stock could have been subscribed for in my name at the time the Company was organized and paid for by Mr. Walker had I desired it, but I felt that the Company needed the prestige of Mr. Walker's name as well as his backing and financial resources for the purpose of endorsing notes to finance the Company in its early days, and, for that reason, I wanted him to be a bona-fide stockholder of record, although I always considered the stock was mine, voted it without any dictation from Mr. Walker, and in fact Mr. Walker was not in the least familiar with the Company, as I did all the work myself. The transfers were made in 1917, because, at that time, the Company seemed to be going along smoothly and I felt that I could get along without Mr. Walker, as I could

raise money without his endorsements, if necessary. I believe I called for the transfers at that time myself.

The subsequent subscriptions of preferred stock issued by the Magee Furnace Company and issued to Mr. Walker were for the purpose of taking up loans to the Company and liquidating its debt in that manner. When I needed any money from Mr. Walker for this purpose, I called upon him for the subscription and it was readily made.

I consider, in view of the size of Mr. Walker's Estate and in view of the fact that I was his personal representative and bore the burden of all his business and in view of the fact that I helped him make a good deal of the money that he had acquired, that I was morally and legally entitled to the compensation I received; that no question of Mr. Walker's death ever entered into the transaction one way or another; that he had no reason to suppose he was going to die, because he was in good bodily health, and the fact of his complete retirement from business was for the purpose of giving him a complete rest and extending his years, which it would have done for many more to come had he not been stricken with a shock. So far as I know, from any talk with Mr. Walker, he had no reason to believe that he was liable to have a shock, or die suddenly; in fact he was preparing to enjoy a ripe old age as his people had all done before him.

Witness my hand this seventh day of October, 1920.

ROBERT M. LEACH.

Commonwealth of Massachusetts.

Bristol ss. Taunton, October 7, 1920.

Then personally appeared, before me, the above-named Robert M. Leach, known to me to be the person he represented himself to be, and made oath to the truth of the statements above subscribed by him.

Everett S. White,
Notary Public.

My Commission Expires December 31, 1925.

PLAINTIFF'S EXHIBIT 5.

TREASURY DEPARTMENT, U. S. INTERNAL REVENUE.

ESTATE TAX RECEIPT

Form 803. Executor's Copy (In Duplicate)

Collector District of Massachusetts At Boston Actual date of payment Feb. 21, 1922

Note.—Payment of the tax indicated by the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of the amount indicated by the return is disclosed and one year and 180 days have elapsed since the date of decedent's death, interest will attach at the rate of 10 per centum per annum on and after the expiration of 30 days from receipt of notice of such excess tax. (Section 407, Revenue Act of 1910.)

Robert M. Leach, Executor, Estate of William E. Walker, c/o White & White, Esqs., Taunton Green, Taunton, Mass.

[Stamped:]
U. S. Int. Revenue District Mass
Paid Feb 21 1922
Malcolm E. Nichols G. H. R. Collector

List 23A (Month) Apr. '21 (Folio) 7 (Line) 9 Date of death Nov. 9, 1918

Partial payment Balance of tax according to Commissioner's notification . . .	$50,000.00
Total	$50,000.00

MM

PLAINTIFF'S EXHIBIT 6.

TREASURY DEPARTMENT INTERNAL REVENUE SERVICE

Boston, Mass. March 24, 1922.

Robert M. Leach, Excr., c/o White & White, Esqs., Taunton, Mass.

Re Estate of William E. Walker

Dear Sir: There is enclosed herewith letter dated March 18, 1922 from the Commissioner of Internal Revenue relative to claim for abatement of additional tax filed by you in the above estate.

As stated in the last paragraph of Commissioner's letter, interest on the additional tax accrues from May 22, 1921 at 10% per annum. If payment is received on March 31, 1922, the amount due will be $6,017.40, figured as follows:

Additional Tax	$52,034.96
Interest May 22, 1921–Feb. 21, 1922, 275 days @ 10%	3,920.44
Amount due February 21, 1922	$55,955.40
Amount paid February 21, 1922	50,000.00
Balance due	$5,955.40
Interest Feb. 21, 1922–March 31, 1922, 38 days @ 10%	62.00
Total	$6,017.40

Respectfully,

MM Enc. MALCOLM E. NICHOLS Collector.

PLAINTIFF'S EXHIBIT 7.

TREASURY DEPARTMENT

Washington March 18, 1922.

Robert M. Leach, Executor, Estate of William E. Walker,
Care of Collector, Boston, Massachusetts.

Sir: The Bureau has examined the claim filed by you, as executor of the above named estate, for abatement of the total additional tax of $79,759.16, found due from the estate upon review of the return, and fully explained in a letter, addressed to you, under date of April 14, 1921.

Although the claim for abatement is directed against the action of the Bureau with reference to a number of items, all protests were waived at the conference, held with the representatives of the estate on February 14, 1922, with the exception of those directed against the following:

Real Estate

Undivided one-half interest in Block 220, Lisbon Street, Lewiston, Maine,

Returned	$15,000
Determined on former review	50,000
Adjusted	30,000

After careful consideration of the evidence submitted on behalf of the estate, together with a supplemental report of investigation from the Boston office, the Bureau finds that the amount, as adjusted above, fairly reflects the value of this item, as of the date of the decedent's death.

Transfers

	Determined on former review	Adjusted
To Robert M. Leach, November 30, 1917:		
100 shares Weir Stove Co., Common,	$122,207.00	$100,000.00

250 shares Magee Furnace Co., common,	25,000.00	
500 shares Magee Furnace Co., 1st Pfd.,	50,000.00	
250 shares Magee Furnace Co., 2d Pfd.,	25,000.00	
To Jennie E. Walker, January 21, 1918:		
200 shares Weir Stove Co., common,	244,414.00	200,000.00
Totals	$466,621.00	$300,000.00

The estate no longer protests the inclusion of the above stock of the Weir Stove Company, as a part of the decedent's gross estate. It is contended, however, that the value of these items, as determined on the former review, is excessive.

After careful consideration of all the evidence on file in this office, relative to the value of the stock of this company, the Bureau is now of the opinion that it was fairly worth $1,000 per share, as of the date of the decedent's death. This value was agreed to by the representatives of the estate at the conference mentioned above.

With reference to the stock of the Magee Furnace Company, the estate contends that these shares were not transferred in contemplation of death, but were purchased by decedent, as a gift for his son-in-law, Robert M. Leach.

Although the stock was taken in the name of the decedent, it is contended that this was done merely for the purpose of lending his name and credit to the business, until it could be established on a sound financial basis.

After careful consideration of the evidence submitted in support of the above contentions, the Bureau finds that the stock in question should be excluded from the decedent's gross estate.

Stocks and Bonds.

200 shares Weir Stove Company, common,

Returned	$160,000.00
Determined on former review	244,414.00
Adjusted	200,000.00

As explained under the caption " Transfers ", the value of the above stock is now determined to be $1,000 per share.

On the review of April 14, 1921, the gross estate was determined to be $1,382.792.79, the deductions $87,294.15, and the net estate $1,295,498.64. The reductions made in the protested items and affecting the gross estate aggregate $231,-035, making the corrected total thereof $1,151,757.79. No change having been made in the deductions, the resultant net estate is now determined to be $1,064,463.64, the tax upon the transfer of which is $89,735.64. As a tax of $37,-700.68, was satisfied upon the basis of the return, the estate is accordingly liable for additional tax of $52,034.96, instead of $79,759.16, as determined on the former review.

Since the additional tax, as determined on the former review, is excessive in the sum of $27,724.20, your claim for abatement of $79,759.16, will be prepared for allowance in the sum of $27,724.20 and rejected as to $52,034.96.

Such portion of the amount rejected as remains unsatisfied should he paid to the Collector, at Boston, Massachusetts, without further delay, together with interest as specified in Bureau letter of notification, dated April 14, 1921.

Respectfully,

HAC D. H. BLAIR Commissioner.

PLAINTIFF'S EXHIBIT 8.

Treasury Department, U. S. Internal Revenue.

ESTATE TAX RECEIPT

Form 803. Revised March, 1920. Executor's Copy (In Duplicate)

Collector District of Massachusetts At Boston Actual date of payment March 27, 1922

Note.—Payment of the tax indicated by the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If tax in excess of the amount indicated by the return is disclosed and one year and 180 days have elapsed since the date of decedent's death, interest will attach at the rate of 10 per centum per annum on and after the expiration of 30 days from receipt of notice of such excess tax. (Section 407, Revenue Act of 1918.)

Robert M. Leach, Executor, Estate of William E. Walker, c/o White & White, Esqs., Taunton, Mass.

[Stamped:]
U. S. Int. Rev. District Mass
Paid Mar 27 1922
Malcolm E. Nichols W. H. O'R

List 23A (Month) Apr. '21 Mar. '22 (Folio) 7 (Line) 9
Date of death Nov. 9, 1918

Balance of	$2,034.96
Balance of tax according to Commissioner's notification	3,975.91
Excess	6.53
Total	6,017.40

MM

PLAINTIFF'S EXHIBIT 9.

UNITED STATES OF AMERICA
Treasury Department

Washington November 8, 1928.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of Claim for Refund of $60,058.03 including interest, estate tax (with statement and Certificate of Appointment of Executor attached), filed by Robert M. Leach, Executor of Will of William E. Walker, Taunton, Massachusetts, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

[SEAL]

(Execute Separate Form for Each Tax Period)

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

ET-1546-Cl. A.-LSP.

State of Massachusetts
County of Bristol ss:

(Name of taxpayer or purchaser of stamps.) Estate of William E. Walker,

(Residence—give street and number as well as city or town and State.) c/o Robert M. Leach, Executor,

(Business address.) 43 Taunton Green, Taunton, Massachusetts.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged . Fiduciary
2. Character of assessment or tax Estate
3. Amount of assessment or stamps purchased
   Tax and interest paid $93,718.08
6. Amount to be refunded (or such greater amount as is legally refundable) including interest 60,058.03
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Feb. 21, and Mar. 27, 1922.
8. District in which return (if any) was filed Massachusetts.

ROBERT M. LEACH
Executor Will of William E. Walker.

Sworn to and subscribed before me this 18th day of June, 1925
Everett S. White
Notary Public.

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer. Robert M. Leach, Exec., Est. of Wm. E. Walker, 45 Taunton Green Taunton Mass.
Character of assessment and period covered. Estate Tax

List, F 23 A				
Year.	1919	1921	1921	1922 1923
Month.	Nov.	Apr.	Apr.	Mar. Feb.
Page.	8	7	7	9 14
Line.	7	9	9	2-8
Amount.	$37,700.68	50,000.00	2,034.96	3,975.91 6.53 (Excess)

Date paid. 11/3/19 2/21/22 3/27/22 3/27/22 3/27/22
District in which paid. Mass.

MALCOLM E. NICHOLS
Collector of Internal Revenue,
per M. Maguire
C. Moore
Assessment Clerk, Commissioner's Office.

District Mass E T (Nature of tax.)
Claimant Estate of William E. Walker
Preferred Jc
Claim examined by A D E B G Claim approved by
H Km Chief of Division.
Amount claimed $60,058.03 Amount rejected $60.058.03
Committee on Claims
R. M. Estes
Deputy Commissioner
L, S. Cannon REC

1. The executor says that in the final determination upon the estate, as shown in Treasury Department letter (ET–1546–Cl. A.–LSP) dated March 18, 1922, the Commissioner of Internal Revenue improperly and wrongfully included in the gross estate so-called "Gifts and Transfers" of the value of $404,450.74, and that no part of the said transferred property should be included in the gross estate because:

(1) The amount shown above does not represent one transaction or gift but a series of gifts, no one of which constituted a material part of the decedent's gross estate. Is it not reasonable to suppose that if the decedent contemplated death at the time of these gifts he would have given the whole amount at one time?

(2) At the time each and every one of these gifts was made, the decedent was in good health and was just as active and as much interested in the affairs of life as he

had always been. He was not suffering from any chronic or malignant affliction or severe spell of sickness, and his whole mental attitude was that of a man who expected to live a long time. He died very suddenly as a result of a shock of but a few days duration.

(3) As to the gift to Mrs. Jennie E. Walker, the decedent's widow, he had always made a practice of giving her periodic presents, and the particular gift to her at the time here in question was made to her partly in accordance with the usual practice of the decedent and partly because of his desire to furnish her with an independent income of her own in order that he might thereby be relieved from the necessity of making periodic allowances to her for her personal comfort and support.

(4) The gifts to Mrs. Mary W. Leach, who was the decedent's daughter, were also made to her in order that she might have an income of her own. These gifts were made around Christmas time, and in fact the decedent intended these gifts as a Christmas present to his daughter, which is quite natural and is to be expected of a man possessing the means of this decedent.

(5) The gifts which were made to Robert M. Leach were made pursuant to a promise made many years before by the decedent to reward the said Robert M. Leach for his long and faithful service to the decedent in his personal affairs as well as in the building up of the Weir Stove Company, out of which the decedent made practically his entire fortune.

(6) It is to be noted also that these gifts were made during the year when the income and surtaxes were particularly heavy, and by making the gifts during this period we believe the decedent was greatly influenced by the fact that thereby he would accomplish a very substantial reduction in his individual income and surtaxes,

just as many other thoughtful and prudent men did and were doing during that unsettled war period.

As to the gifts in question, your attention is called to the affidavits already on file with the Department, which, it is submitted, clearly and fully support all of the foregoing contentions of the executor, and we respectfully request that the Department reconsider its determination of these gifts in the light of the more recent decisions as to just what circumstances must prevail in order to establish conclusively the presumption of contemplation of death.

2. And the executor further says that the estate tax itself is a deductible "claim or charge against the estate," according to the provisions of the Act of 1917, under which the tax is imposed upon this estate, and that in the computation of the tax there should be deducted an amount equal to the tax, because:

(1) Section 203 of Title II of the Act of September 8, 1916, as amended, as reenacted and approved by the Act of 1917, provided that all "claims against the estate . . . and such other charges as are allowed by the laws of the jurisdiction under which the estate is being administered" should be deducted in the determination of the net estate, and because

(2) The U. S. Supreme Court has held that under the acts prior to the Act of 1918, which later act made an express exception, the "estate tax" imposed by the State of Pennsylvania was deductible for the purposes of the Federal Tax. See *Lederer* v. *Northern Trust Co.*, 262 Fed. 52; 40 Sup. Ct. 483.

The executor contends that if the estate tax of a state was deductible under the Act of 1917 as a "claim against the estate" it must necessarily follow that the amount required to pay the Federal estate tax should be deducted, because there is no difference in principle between the State tax and the Federal tax. The Federal tax is a claim exactly analo-

gous to the Pennsylvania tax. If it had not been the intent of Congress, in the enactment of the Act of 1917, to allow "all claims against the estate" to be deducted, including the state tax, that intent would have been expressed as was done in the Act of 1918 and all later acts.

The executor contends, therefore, that the computation of the tax under the Act of 1917 should show as a deduction an amount equal to the amount of the total tax required to be paid.

The computations of the tax as determined by the Bureau in the closing letter and that based on the foregoing contentions of the executor are shown in the following summary:

Computation of the Tax.

	Column 1 As determined by the Bureau.	Column 2 As claimed by the executor.
Gross Estate:		
Real estate	$84,785.00	$84,785.00
Gifts and transfers	404,450.74	.....
Stocks and bonds	395,146.51	395,146.51
Mortgages, notes, etc.	267,375.54	267,375.54
Total Gross Estate	$1,151,757.79	$747,307.05
Deductions:		
Funeral and administration expenses	20,152.02	20,152.02
Claims against the estate:		
Debts of decedent	8,642.13	8,642.13
Estate tax	.....	43,637.54
Charitable bequests	8,500.00	8,500.00
Specific exemption	50,000.00	50,000.00
Total Deductions	87,294.15	130,931.69
Net Estate for Tax	$1,064,463.64	$616,375.36

	Tax	
On $1,000,000.00	82,000.00	. . . . .
" 64,463.64 at 12%	7,735.64	. . . . .
" 450,000.00	. . . . .	27,000.00
" 166,375.36 at 10%	. . . . .	16,637.54
Total Tax	$89,735.64	$43,637.54

Statement of Tax Payments and Interest.

Tax and Interest as Determined:		
Original tax paid as per return	$37,700.69	
Additional tax paid Feb. 21, 1922	50,000.00	
Additional tax paid Mar. 27, 1922	2,034.96	
Total tax as per Col. 1 above	$89,735.64	
Interest paid Mar. 27, 1922	3,982.44	
Total and Interest Paid		93,718.08
Tax and Interest as Claimed:		
Original tax paid as per return	$37,700.69	
Additional tax due—paid Feb. 21, 1922	5,936.85	
Total tax due as per Col. 2 above	$43,637.54	
Interest on $5,936.85 from 5/22/21 to 2/21/22—275 days at 10%	445.81	
Total Tax and Interest payable		44,083.34
Overpayment Refundable as Claimed		$49,634.74
Interest Claimed—Estimated:		
On $43,617.34—from 2/21/22 at 6%		9,159.64
On 6,017.40—from 3/27/22 at 6%		1,263.65
Total Refund and Interest Claimed		$60,058.03

Conclusion.

I respectfully request the opportunity of an oral hearing in Washington, before the Board in the Bureau of Internal Revenue and before the Solicitor, in order that further evidence, witnesses and arguments may be presented. In view of the circumstances, I also respectfully request that this claim be considered as soon as possible and a date set for a final hearing on the case.

Respectfully submitted,

ROBERT M. LEACH, Executor.

Commonwealth of Massachusetts

County of Bristol ss.

Sworn to and subscribed before me this 27th day of July, 1925. Before me,

John W. Root,

Notary Public.

Commonwealth of Massachusetts.

Bristol, ss. Probate Court.

I, Guilford C. Hathaway, Register of the Probate Court for said County of Bristol, hereby certify that at a Probate Court holden at Taunton in and for said County, on the sixth day of December in the year of our Lord one thousand nine hundred and eighteen, the last will and testament of William E. Walker late of Taunton in said County, deceased, testate, was duly proved and allowed, and letters testamentary thereon issued to Robert M. Leach of said Taunton the executor therein named who gave bond in the penal sum of One million dollars, to the acceptance of the Judge of said Court for the due performance of said trust according to law.

I also certify that it appears by the records and files of said Court that said letters are now in full force.

In witness whereof I have hereunto set my hand and the seal of said Court, this thirtieth day of April in the year of our Lord one thousand nine hundred and twenty-five.

[SEAL] Guilford C. Hathaway, Register.

[On back:]

Executor. Certificate of Appointment.

Office of Internal Revenue Estate Tax Received Jul 29 1925

Office of Internal Revenue Estate Tax Received Jun 26 1925

PLAINTIFF'S EXHIBIT 10.

TREASURY DEPARTMENT

Washington August 7, 1925.

Robert M. Leach, Executor, 43 Taunton Green, Taunton, Massachusetts.

Sir: Reference is made to claim for refund of estate taxes paid by the above named estate, and to the evidence filed in support thereof.

In compliance with your request, a hearing has been scheduled for 11 A. M., August 26, 1925, to be held at Room H-152, Building C, Sixth and B Streets, Southwest, Washington, D. C. Any further evidence you may care to submit should be filed with the Bureau at least five days prior to the date of the conference.

Attention is directed to the fact that all attorneys and agents practicing before the Estate Tax Division must procure from the executor or administrator a properly stamped and executed power of attorney, and also must be admitted to practice before the Treasury Department. Applications for admission to practice should be directed to the Committee on Enrollment and Disbarment, Treasury Department, Washington, D. C., who will, upon request, supply the necessary forms and information.

If you do not appear on the date set for this hearing, either in person or by agent acting under a written power of attorney, the Bureau will promptly pass upon the claim in the light of the documentary evidence at that time on file.

Respectfully,

CHAS. A. DRAKE

CD Acting Deputy Commissioner.

PLAINTIFF'S EXHIBIT 11.

TREASURY DEPARTMENT

Washington January 16, 1926.

Robert M. Leach, Executor, Estate of William E. Walker,
43 Taunton Green, Taunton, Massachusetts.

Sir: The Bureau has examined the claim filed by you, as executor of the above named estate, for refund of $60,058,03 of the Federal estate tax paid under the provisions of the Revenue Acts of 1916 as amended, and 1917.

The claim is based upon the inclusion in the gross estate of the value of property transferred by the decedent in his lifetime, and upon the amount of deductions allowed the estate on review.

Upon consideration of all the evidence before it, the Bureau is of the opinion that the value of the property transferred was properly included in the gross estate.

It is also contended by the estate that, under Section 203 of the Revenue Act of 1916, the estate is entitled to a deduction in the amount of Federal estate tax paid as "other charges against the estate, as are allowed by the laws of the local jurisdiction."

Article 21, Regulations 37, relating to the estate tax, revised May, 1917, provides as follows:

> "The Federal estate tax is not determined, does not attach, and can not be assessed or paid until the net estate upon which it is based has been exactly established. The estate tax, therefore, can not be deducted from the gross estate to determine the taxable net estate."

This regulation has been strictly adhered to by the Bureau in every instance, and no exception thereto can be made in this estate.

In view of the foregoing, your claim for refund of $60,058.03 is rejected in its entirety.

Respectfully,

C. R. NASH,

aho Acting Commissioner.

PLAINTIFF'S EXHIBIT 12.

Copy

O. Walker Taylor Attorney and Counsellor at Law
Specialist Taxes on Estates and Probate Matters
11 Beacon Street Boston, Mass.

April 21, 1928

General Counsel, Bureau of Internal Revenue, Walker-Johnson Building, Washington, D. C.

In re: Leach *vs.* Nichols

Dear Sir: In view of the fact that we have received no notice or information in regard to the settlement of the above named case, it is necessary for us to prepare for retrial at this time. We have, therefore, made motion and the case is tentatively set down for retrial during the third week of May.

When we were in Washington on March 6 we were definitely promised some word from the Department within two weeks from that date, and we must therefore construe the failure of any notice to mean that the Government is unwilling to settle the case.

When we had our conference in the Estate Tax Division on March 6 I left the stenographic report of the previous trial with the conferees, among whom was Mr. Hunt, with the understanding that it should be returned to me. The copy which I left is the only copy which I have and I would greatly appreciate it if you will return the same to me at your earliest convenience, as I have been advised by Mr. McGovern of the Estate Tax Division that this report is now among the papers in your office.

Trusting that I may receive the stenographic report within the next few days, I beg to remain

Yours very truly,

OWT:P O. W. TAYLOR.

PLAINTIFF'S EXHIBIT 13.

TREASURY DEPARTMENT BUREAU OF INTERNAL REVENUE

Washington April 26, 1928.

Mr. O. Walker Taylor, 11 Beacon Street, Boston, Mass.

In re: Robert M. Leach, Executor, Estate of William E. Walker, *v.* Nichols.

Sir: Receipt is acknowledged of your letter of April 21, 1928, regarding the above-entitled case.

After a careful review of the question involved, this office, on April 25, 1928, recommended that the claim for refund be reopened and allowed to the extent of excluding from the gross estate transfers heretofore held taxable.

In view of this action and your statements while you were in Washington on this case, it is assumed that you have no objection to leaving the transcript of the testimony at the previous trial with this office for its files.

Respectfully,

O. M. CHAREST,

evp General Counsel.

PLAINTIFF'S EXHIBIT 14.

O. Walker Taylor Attorney and Counsellor at Law
Specialist Taxes on Estates and Probate Matters
11 Beacon Street Boston, Mass.

April 26, 1928.

Hon. D. H. Blair, Commissioner of Internal Revenue, Washington, D. C.

In re: Leach *v.* Nichols

My dear Commissioner: On March 6, 1928 you were good enough to grant a hearing to Mr. Robert M. Leach of Taun-

ton, Massachusetts and his counsel with reference to settlement of the above named case.

We had several conferences on the case, and the officials of the Estate Tax Division and the General's Counsel's Office promised to give us a decision within two weeks of that date. Up to the present time we have heard nothing whatever.

We are now placed in a very embarrassing position as will be seen by a letter which I am addressing to the General Counsel, a copy of which is enclosed.

In behalf of Mr. Leach may I respectfully request that you use your good offices to the end that we may be advised at an early date as to the status of this case.

Very respectfully,

OWT : P Enclosures O. W. TAYLOR.

[Stamped :]
Received May 1 1928 General Counsel Office
Bureau of Internal Revenue

April 26, 1928.

Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Walker Johnson Building, Washington, D. C.

In re : Leach *vs.* Nichols

Dear Sir : The above named case now stands for retrial in the District Court at Boston, Massachusetts. In the first trial of the case the lower court sustained the defendant's motion for a directed verdict. The case was appealed and the decision of the lower court was overruled and the case remanded for retrial by the United States Circuit Court for the First Circuit. At the former trial in the lower court Judge Lowell stated that he felt perfectly certain that on the merits of the case he should direct a verdict for the plaintiff except for an instrument which, in his opinion, was a legal bar to the maintenance of the suit. The Circuit Court held that the instrument was not a legal agreement and therefore remanded the case for retrial. The United States Attorney

at Boston has recommended to the Department that the case be settled without retrial.

On March 6, 1928 Mr. Leach, the plaintiff, and Messrs. White and myself, his attorneys, were in Washington and had a conference with Commissioner Blair, with the Conference Committee in the Estate Tax Division and with Mr. Hunt of your office, and on that date, namely March 6, we very urgently asked that we may have a decision as to whether or not the Bureau would settle the case at an early date. The officials with whom we talked promised us faithfully that they would notify us within two weeks from that date and advise us whether or not the Department would settle the case without retrial.

We pointed out very forcefully that it is very important for us to know the decision of the Bureau in regard to settlement in order that we may put the case on the list for retrial at the present term of the Court. We have delayed marking the case up in the regular order and forcing a trial purely out of courtesy and at the request of the United States Attorney at Boston. We have now come to the point, however, where we must take some action and we are very much embarrassed by reason of the fact that we have not received any word from the officials in Washington as to whether or not the case will be settled.

Since March 6 I have visited the officials of the Estate Tax Division and was advised by them that they had made their recommendation and had referred the case to your office. On April 10 I was again in Washington and visited your office and had a conference with Mr. Hunt, who I understand has charge of this case. Mr. Hunt also stated to me that he had made his recommendation.

In addition to these conferences I have written two letters asking for some information one way or the other. If, of course, your office should insist upon a retrial we should like to arrange to have the case tried at this term of the Court

but we do not wish to force trial because we wish to extend every courtesy possible to the United States Attorney in Boston. The last letter addressed to your office was dated April 21, 1928.

This matter is of very great importance to us and may I respectfully and urgently ask that you use your good offices to ascertain and advise us just what the status of this case is.

Yours very truly,

OWT:P

PLAINTIFF'S EXHIBIT 16.

TREASURY DEPARTMENT

Washington May 2, 1928.

Mr. O. W. Taylor, 11 Beacon Street, Boston, Mass.

My dear Mr. Taylor: Your letter of April 26th, in regard to the case of Leach *v.* Nichols, was duly received. I find that our General Counsel addressed you a letter on the same date, a copy of which I am enclosing. I trust that this satisfactorily disposes of the matter.

Very truly yours,

D. H. BLAIR Commissioner.

PLAINTIFF'S EXHIBIT 16.

TREASURY DEPARTMENT

Washington May 7 1927

Robert M. Leach, Executor, Estate of William E. Walker, 43 Taunton Green, Taunton, Massachusetts.

Sir: As a result of an audit of the estate tax return, Form 706, filed for the above-named estate, and a consideration of all the claims (if any) filed on behalf of the estate, a certificate of overassessment of estate tax is being prepared.

Before any portion of the overassessment can be certified for refund, it is necessary that there be filed documentary evidence indicating the persons entitled to the refund. If the

executor or administrator has not been discharged, the evidence should consist of a short-form certificate of current attestation from the probate court showing the appointment of the executor or administrator, and that the appointment remains in full force and effect. In the event the executor or administrator has been discharged, there should be submitted in lieu of such certificate: (1) A statement of the court (a) certifying to the fact of discharge, and (b) naming the distributees of the estate and indicating the proper share to which each is entitled: or (2) An authenticated copy of the will, or, in case there was no will, affidavits and such other evidence as can be adduced tending to show the relationship of the claimants to the decedent, and that each of them is entitled to the respective share claimed under the law of the domicile of the intestate.

The documentary evidence should be forwarded to this office without delay. Respectfully,

R. M. ESTES,
Deputy Commissioner.

PLAINTIFF'S EXHIBIT 17.

[SEAL] TREASURY DEPARTMENT

Internal Revenue Service Office of the Collector District of Massachusetts

In Replying Refer to Claims Division Check File #MTR-5640

Boston, Mass. Aug 21 1929

Robert M. Leach, Executor, u/w of William E. Walker, 43 Taunton Green, Taunton, Mass.

I am holding a check drawn in your favor by the Disbursing Clerk of the Treasury Department in the amount of $1466.86 on account of an Overpayment of Estate tax with such interest as is allowed under the provisions of Section 614 of the Revenue Act of 1928. The check covers the following items:

Refund for	ended	19	$1017.38	Interest	$449.48
Refund for	ended	19	$	Interest	17.38
					$476.86

Before I can release this check I will have to ask you to make a statement that there are no outstanding internal revenue taxes against you which are due and payable, in this or any other office of a Collector of Internal Revenue.

It will also be necessary to state if you took credit in your income tax return filed during the current year for any amount representing an overpayment of tax on account of a prior year's account. If such credit was taken, please state the amount thereof and when the alleged overpayment of tax was made.

Kindly return this letter immediately with the requested information, using the form provided below which should be properly signed. Respectfully,

THOMAS M. WHITE Collector.

** I hereby certify that there (are no) outstanding internal revenue taxes against me which are due and payable.

** I hereby certify that I (have taken) credit on my income tax return for the year

1921 in the sum of $50,000 in the name of Mary W. Leach
1922 6,017.40 matter now pending before Board of Tax Appeals.

Date August 28, 1929.

Taxpayer's signature. Robert M. Leach Executor u/w of William E. Walker—Present address 44 Harrison St. Taunton Mass.

(** Mark out words not applicable)

Aug. 29, 1929.

Hon. Thomas M. White, Collector of Internal Revenue, 22 Pearl St., Boston, Mass.

Dear Mr. White:—Enclosed please find Certificate duly signed by Robert M. Leach as Executor under the Will of William E. Walker.

Will you kindly send a check for $1466.86 to Mr. Leach at your convenience?

Very truly yours,

Enc.

PLAINTIFF'S EXHIBIT 18.

UNITED STATES OF AMERICA
Treasury Department

Washington February 3, 1930.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of Bureau Record Copy of Certificate of Overassessment, allowing $1,017.38, in re: Robert M. Leach, Executor, u/w of William E. Walker, Taunton, Massachusetts, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

F. A. BIRGFELD,
[SEAL] Chief Clerk, Treasury Department.

Treasury Department
Office of Commissioner of Internal Revenue Washington

CERTIFICATE OF OVERASSESSMENT

Number: 1546—Mass. Allowed: $1,017.38 Schedule No. ETB-5640

Robert M. Leach, Executor, u/w of William E. Walker, 43 Taunton Green, Taunton, Massachusetts.

Sir: An audit of the estate tax return, Form 706, of the estate of William E. Walker, who died November 9, 1918, and a consideration of all the claims (if any) filed by you indicates that the tax assessed against the estate was in excess of the amount due as per the following statement:

Assessments:		
November 1919, P. 8, L. 7		$37,700.68
April 1921, P. 7, L. 9		79,759.16
March 1922, P. 9, L. 2		3,975.91
February 1923, P. 14, L. 8		6.53
Total assessments		$121,442.28
Less prior allowances:		
Schedule ETA-72	$27,724.20	
Schedule MTR-2083	43,865.37	71,589.57
Tax remaining		$49,852.71
Correct tax liability	$48,001.29	
Interest	834.04	48,835.33
Overassessment		$1,017.38

The overassessment results from correcting an error of $1,000.00 in the computation of the tax as shown on the certificate of overassessment issued under date of May 25, 1928, which is the only adjustment permissible on the claim.

The amount of the overassessment will be abated or refunded as indicated below. (The estate will be relieved from the payment of any amount abated; and any amount found to be refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the amount found to be refundable.

Date claim filed June 26, 1926.

District: Mass. Interest: 449.48

Record of Audit and Review	Date
Return audited: G E R	7/17/29
Reviewed (Unit): O J B	7/17/29

Review Section

Approved: H K Melcher, 7/18/29

Head of Division

Approved: R. M. Estes E. B. Thompson 7-19-29

Committee

Robert M. Leach, Executor u/w of William E. Walker

Estate Tax

Tax 23A 1919 Nov. 8	7	37700 68	11/3/19	37700 68	Pd.
Tax 23A 1921 Apr. 7	9	79759 16	2/21/22	50000 00	Pd.
			3/27/22	2034 96	Pd.
			ET-A-72	27724 20	Ab.
Addl. Tax					
23A 1922 Mar. 9	2	3975 91	3/27/22	3975 91	Pd.
Excess 23A 1923 Feb. 14	8	6 53	3/27/22	6 53	Pd.
		121442 28		121442 28	

THOMAS W. WHITE
Collector of Internal Revenue
by V. H. Lewis, Deputy Collector

PLAINTIFF'S EXHIBIT 19.

TREASURY DEPARTMENT. INTERNAL REVENUE SERVICE

Boston, Mass. July 3, 1928.

Mr. Robert M. Leach, Executor u/w of William E. Walker,
43 Taunton Green, Taunton, Mass.

Sir: Enclosed find form letter notifying you of a refund check for $60,329.32 drawn in your favor to cover a refund of Federal Estate tax in the amount of $43,865.37 with $16,463.95 interest.

You are requested to fill in the certification at the bottom of the letter and return it to this office properly signed. In addition you are requested to inform this office whether the Federal Estate tax was deducted on the income tax returns filed for the years 1919, 1921, 1922 and 1923, or upon any other income tax return.

In replying it is essential that you use the reference given

at the beginning of this letter and attach the enclosed copy of this communication to your reply.

Respectfully,

THOMAS W. WHITE, Collector.

MCK–H Enc: Form letter

PLAINTIFF'S EXHIBIT 20.

Treasury Department

Office of Commissioner of Internal Revenue. Washington

CERTIFICATE OF OVERASSESSMENT

Number: 1546.—Mass. Allowed: $43,865.37

Schedule No. MTR–2083

Robert M. Leach, Executor, u/w of William E. Walker, 43 Taunton Green, Taunton, Massachusetts.

Sir: An audit of estate tax return, Form 706, of the estate of William E. Walker, who died November 9, 1918, and a consideration of all the claims (if any) filed by you indicates that the tax asssessed against the Estate was in excess of the amount due as per the following statement:

Original assessment	(Nov. 1919, P. 8, L. 7)		$37,700.68
Additional assessment	(Apr. 1921, P. 7, L. 9)		79,759.16
Additional assessment	(March 1922, P. 9, L. 2)		3,975.91
Additional assessment	(Feb. 1923, P. 14, L. 8)		6.53
Total assessments			$121,442.28
Less prior allowance:	ETA–72		27,724.20
Remaining assessment			$93,718.08
Less correct tax liability		$49,001.19	
Interest		851.42	49,852.71
Overassessment			$43,865.37

(See attached statement)

The amount of the overassessment will be abated or refunded as indicated below. (The estate will be relieved from

the payment of any amount abated; and any amount found to be refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the amount found to be refundable.

Date claim filed June 20, 1925.

Respectfully,

R. M. ESTES

Deputy Commissioner.

Refunded: $43,865.37 Interest: $16,463.95.

Instructions executed Thomas W. White Collector Int. Rev.

The overassessment results from a reconsideration of the estate's claim for refund of $60,058.03.

In view of all the evidence now before the Bureau the following adjustments are made:

Transfers

	Returned	Prior Audit	Determined
Stock transferred to Robert M. Leach, November 30, 1917.			
100 shares Weir Stove Company	0.00	$100,000.00	0.00
Stock transferred to Jennie E. Walker, January 21, 1918.			
200 shares Weir Stove Company	0.00	200,000.00	0.00
Stock transferred to Mary W. Leach.			
235 shares Metropolitan Furniture Company	0.00	50,712.90	0.00
49 shares Atherton Furniture Company	0.00	41,231.54	0.00
LeBaron Atherton note and accrued interest	0.00	12,506.30	0.00

The foregoing adjustments are reflected in the following summary:

	Returned	Prior Audit	Adjusted
Gross estate	$629,785.18	$1,151,757.79	$747,307.05
Deductions	72,778.42	87,294.15	87,294.15
Net estate	557,006.76	1,064,463.64	660,012.90
Total tax	37,700.68	89,735.64	49,001.29

PLAINTIFF'S EXHIBIT 21.

UNITED STATES OF AMERICA,

Treasury Department

Washington February 3, 1930.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of "Amendment to" Claim for Refund of $49,634.74, Estate Tax (with statement of facts and exhibits attached), filed by Robert M. Leach, Executor, Estate of William E. Walker, Taunton, Massachusetts, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

F. A. BIRGFELD,

[SEAL] Chief Clerk, Treasury Department.

Treasury Department Internal Revenue Service

(Execute Separate Form for Each Tax Period)

Amendment to Claim for Refund of Taxes Illegally Collected

Collector's Notation May 3 1929

District of Mass. State Tax Division.

Date Received Boston Mass. May 3 1929 Claim Div. Int Revenue

State of Massachusetts

County of Bristol ss.

(Name of taxpayer or purchaser of stamps.) Estate of William E. Walker,

(Residence—give street and number as well as city or town and state.) Robert M. Leach, Executor,

(Business address.) 43 Taunton Green, Taunton, Massachusetts.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged Executor of the estate
2. Character of assessment or tax Estate tax
3. Amount of assessment or stamps purchased as per original claim $93,718.08
6. Amount to be refunded (or such greater amount as is legally refundable) as per original claim $49,684.74
7. Dates of payment (see Collector's receipts or indorsements of canceled check) 2/21/22 and 3/27/22
8. District in which return (if any) was filed Massachusetts.

Deponent verily believes that this application should be allowed for the following reason:

In addition to the adjustments made in the Commissioner's audit of May 28, 1928 the undersigned respectfully submits that the estate was and is by law entitled to a further refund in the amount of $8,143.08 together with interest on account (1) of additional executor's fees paid, $10,000.00; (2) of additional attorneys' fees paid $20,000.00; (3) of additional administration expenses $1,567.70; (4) Massachusetts Inheritance tax paid $34,158.59; (5) of error in computing the tax on net estate $660,012.90 in audit of May 28, 1928 which is only $48,001.29, instead of $49,001.29 as determined, a difference

of $1,000.00 in the tax, as are more fully set forth in the attached statement of facts and exhibits.

ROBERT M. LEACH

Swort to and subscribed before me this 27th day of April, 1929. Lindsey I. Phillips

Notary Public.

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer. Robert M. Leach, Exer., Est. of Wm. E. Walker, 43 Taunton Green, Taunton, Mass.

Character of assessment and period covered. Estate Tax List. F 23A

Year. 1919 1921 1922 1923

Month. Nov. Apr. Mar. Feb.

Page. 8, 7, 9, 14

Line. 7 9 2 8

Amount. $37,700.68 52,034.96 3,975.91 6.53 Excess

Date paid. 11/3/19 (50,000.00—2/21/22 2,039.96—3/27/22) pfd. 3/29/32

District in which paid. Mass.

THOMAS W. WHITE
Collector of Internal Revenue
per M. Maguire
Assessment Clerk, Commissioner's Office.

MT-ET-Cl-R-1546-AD

District of Massachusetts

Estate of William E. Walker Date of death November 9, 1918

FACTS IN SUPPORT OF AMENDMENT TO CLAIM FOR REFUND

In this case the original claim for refund was filed within four years as required by law and the suit in the Federal

District Court, Leach *vs.* Nichols, Law Docket No. 2700, was seasonably brought and is still pending. Upon motion made in the Federal District the plaintiff has been permitted to amend the original declaration by setting forth that the estate tax assessed by the Commissioner was erroneous, wrongful and excessive on account of the grounds set forth in this amendment to the claim for refund. In view of the fact that under the rules of the District Court either party may amend his pleadings at any time before final judgment, it is respectfully submitted that since the suit was brought on the original claim same right to amend should extend to such claim where circumstances arise, before final disposition of the suit, which did not exist at the time the original claim was filed. In this case all of the grounds upon which the claimant now amends his claim for refund arose after the four year period had expired but before the termination of the suit in the Federal Court, and it is respectfully submitted that the filing of this amendment to the claim for refund is both within the letter and spirit of Section 3226 of U. S. Revised Statutes and is entirely consonant with justice and equity. The facts as to each of the grounds alleged in the amendment to the claim for refund are as follows:

1. Deduction of Additional Executor's Fee and Attorneys' Fees and Additional Administration Expenses:

By reason of the fact that in the final determination of the tax upon the estate the Commissioner included certain gifts and transfers in the gross estate as having been made in contemplation of death it became necessary for the executor to bring suit in the Federal District Court, at Boston. The case was lost in the District Court on technical grounds other than the merits of the case. Upon appeal to the Circuit Court of Appeals the decision of the Lower Court was overruled and the case remanded for retrial. Whereupon the executor who was the plaintiff in the case requested that the Bureau consider the evidence and reopen the claim. This

request was granted and as a result the original claim was reconsidered, the tax redetermined and the estate received a refund of approximately $60,000.00 representing the tax which had been assessed upon the gifts and the interest thereon. This however did not dispose of the suit in Court. The executor, as shown by the evidence attached hereto, paid $20,000.00 as attorneys' fees for this litigation and $10,000.00 additional executor's fee and $1,567.70 additional administration expenses. All of these payments represented disbursements from the estate and under the law are proper deductions from the gross estate. In the very nature of the case these deductions could not be claimed at the time the original claim for refund was filed because they had not been paid, nevertheless they are the result of an erroneous determination of the tax and represent an additional burden imposed upon the estate by an error of the Bureau and for these reasons it is submitted that it is only just and fair that they should now be deducted from the value of the gross estate. There is attached hereto the necessary evidence showing the payment of these sums.

2. Deduction of the Massachusetts Inheritance Tax.

There is attached hereto a certified receipt from the Massachusetts Inheritance Tax Department showing that the estate paid $34,158.59 as inheritance tax. At the time the original claim for refund was filed the policy and the regulations of the Treasury Department prohibited the deduction of such tax under the Acts of September 18, 1916 as amended and the Act of October 3, 1917 as "such other claim or charge as is allowed by the laws of the jurisdiction under which the estate is being ministered". That ruling of the Bureau was based upon the decision in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345. Later this case was overruled by *Keith* v. *Johnson*, 271 U. S. 1 and on June 18, 1928 the case of *Merrill* v. *U. S.* was decided

by the Court of Claims. In that case Judge Morse following *Keith* v. *Johnson* held that under the Act applicable to this estate the Massachusetts Inheritance Tax was a proper deduction. It is thus apparent that, in the very nature of the case, this decision not having been handed down until 1928, the executor could not have asserted his right to this deduction in the original claim because the regulation of the Commissioner prohibited such deduction.

The law has always imposed upon the Commissioner the duty to determine the true and correct tax upon every estate. (See Section 207, Revenue Act of September 8, 1916 as amended.) This estate was and is clearly entitled to recovery on the merits of the case. It is respectfully submitted, therefore, that in all justice and equity the Commissioner should allow this amendment and should waive the technical objection that the grounds were not set out in the original claim, since it is clearly within the province of the Commissioner to waive such objection if he should desire to do so. (See *Tucker* v. *Alexander*, 275 U. S. 228.)

3. Error in Computation of the Tax.

With reference to the Commissioner's last audit and determination of the tax upon this estate made on or about May 28, 1928, the attention of the Bureau is called to what appears to be an error of $1,000 in the computation of the tax. In that audit the net estate was determined to be $660,012.90 and the total tax thereon, $49,001.29 whereas the tax according to the rates applicable on a net estate of that value appears to be on "$48,001.29", and the claimant respectfully submits that this error should in any event be corrected. Exhibit A attached hereto shows in comparative columns the computation of the tax upon the estate as finally determined by the Commissioner on May 28, 1928 and that now claimed by the executor on the basis of the facts set forth in this amendment to the original claim.

4. Evidence Submitted Herewith.

Exhibit A: Computation of the tax as determined by the Bureau and as claimed.

Exhibit B: Receipt showing payment of attorney's fee of $10,000.

Exhibit C: Sworn statement showing additional administration expenses of $1,567.70; executor's fee $10,000; attorney's fee $20,000.

Exhibit D: Certified copy of receipt showing payment of Massachusetts Inheritance Tax in the amount of $34,158.59.

Conclusion.

The claimant respectfully submits that this amendment to his original claim should be considered and allowed by the Bureau not only because of the facts and circumstances presented above, but also because of the provisions of Treasury Decision 7235, to wit:

> "III. Reopening Prior to the Expiration of the Statute of Limitations.
>
> Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration of the statute of limitatious for bringing suit, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening."

Respectfully submitted,

ROBERT M. LEACH,
Executor Estate of Wm. E. Walker.

State of Massachusetts,
County of Bristol, ss.

Sworn to and subscribed before me this 27th day of April, 1929 at Taunton, Massschusetts.

Lindsey I. Phillips,
Notary Public.

Exhibit A.

1. Summary of the Estate.

	Commissioner's Audit May 28, 1928.	Plaintiff's Amended Refund Claim.
Gross Estate:		
Real Estate	$84,785.00	$84,785.00
Stocks and Bonds	395,146.51	395,146.51
Mortgages, notes and Miscellaneous	267,375.54	267,375.54
Total Gross Estate	$747,307.05	$747,307.05
Deductions:		
Funeral expenses	996.00	996.00
Administration Expenses:		
Executor's Fee	15,654.02	25,654.02
Attorney's Fee	3,500.00	23,500.00
Miscellaneous	2.00	1,569.70
Claims against the Estate:		
Debts of Decedent	8,642.13	8,642.13
Massachusetts Inheritance Tax		34,158.59
Charitable Bequests	8,500.00	8,500.00
Specific Exemption	50,000.00	50,000.00
Total Deductions	$87,294.15	$153,020.44
Net Taxable Estate	$660,012.90	$594,286.61

2. Computation of the Tax

On $50,000.00 at 2%	1,000.00	1,000.00
On 100,000.00 at 4%	4,000.00	4,000.00
On 100,000.00 at 6%	6,000.00	6,000.00
On 200,000.00 at 8%	16,000.00	16,000.00
On 210,012.90 at 10%	21,001.29	14.428.66
Total Tax	* $49,001.29	$41,428.66

* Error. Tax on net estate of $660,012.90 is only $48,001.29.

Exhibit B.

O. Walker Taylor Attorney and Counsellor at Law
Lawyers Building, 11 Beacon Street
Specialist Taxes on Estates and Probate Matters

Boston, Mass. April 27, 1927.

Received of Mr. Robert M. Leach, executor of the estate of William E. Walker on account of attorney's fees in the case of Leach *v.* Nichols now pending in the Federal Court at Boston, Massachusetts the following:

July 5, 1928 . . .	$5,000.00
July 13, 1928 . . .	5,000.00

O. WALKER TAYLOR

Exhibit C.

Affidavit of Expenditures *in re* William E. Walker Estate

I, Robert M. Leach, Executor of the William E. Walker Estate, being duly sworn depose and say that I have paid out of the funds of the estate for executor's fee and for attorney's fees and expenses in connection with hearings in Washington on the claim for refund and in the suit of Leach *v.* Nichols, now pending in the Federal District Court at Boston, Massachusetts the following sums:

Executor's fee:		
July 31, 1928—Robert M. Leach . . .		$10,000.00
Attorney's fees:		
July 5, 1928—White and White .	$5,000.00	
July 13, 1928—White and White .	5,000.00	
July 5, 1928—O. W. Taylor . .	5,000.00	
July 13, 1928—O. W. Taylor .	5,000.00	
Total attorneys' fees paid . . .		$20,000.00
Expenses:		
July 31, 1928, O. W. Taylor—For reimbursement of expenses of two trips		

to Washington and Costs, printing etc. *in re* Leach *v.* Nichols advanced by him	$539.52
July 31, 1928—White and White—For reimbursement of expenses of two trips each to Washington of E. S. White and A. R. White advanced by them	460.71
July 31, 1928—Robert M. Leach—For reimbursement of expenses of notary, stenographer, and witnesses at hearing at Taunton and two trips to Washington	567.47
Total expenses paid . . .	$1567.70

ROBERT M. LEACH

State of Massachusetts
County of Bristol, ss.

Sworn to and subscribed before me this 27th day of April, 1929 at Taunton, Massachusetts.

Lindsey I. Phillips
Notary Public.

Exhibit D—Page 1.

Duplicate No. 31294

Commonwealth of Massachusetts

LEGACY AND SUCCESSION TAX

Department of Corporations and Taxation

State House, Boston, November 10 1919

To Robert M. Leach Executor of the will of William E. Walker late of Taunton

Address c/o Weir Stove Co., Taunton

In accordance with the provisions of Section 20 of Chapter 563 of the Acts of the year 1907, and all acts amendatory thereof, I hereby certify that there will become due from and

payable by you to the Treasurer and Receiver General on December 6 1919 the sum of Thirty-two hundred twenty-one $\frac{59}{100}$ Dollars On account for the tax on legacies and devises being in full on all interests presently due:

$50,000.00 at 1%	$500.00
50,000.00 at 2%	1,000.00
9,000.00 at 3%	270.00
20,181.75 at 4%	807.27
25% addl war tax	644.32
	$3,221.59

WILLIAM D. T. TREFRY
Commissioner

Received payment November 12, 1919

Charles L. Burrill Treasurer
by H. J. Miller

Tax $3,221.59 Discount $8.59—Total $3,213.00

Exhibit D—Page 2.

Duplicate No. 31374

Commonwealth of Massachusetts

LEGACY AND SUCCESSION TAX

Department of Corporations and Taxation

State House, Boston, November 17 1919

To Robert M. Leach Executor of the will of William E. Walker late of Taunton

Address c/o Weir Stove Co., Taunton

In accordance with the provisions of Section 20 of Chapter 563 of the Acts of the year 1907, and all acts amendatory thereof, I hereby certify that there will become due from and payable by you to the Treasurer and Receiver General on August 18 1920 the sum of Thirty-one thousand, six hundred eighty-four $\frac{88}{100}$ Dollars Balance in full for the tax on all taxable interests

$186.668.25 at 4%	$7,466.73
357,624.37 at 5%	17,881.22
25% addl war tax	6,336.98
	$31,684.93

WILLIAM D. T. TREFRY
Commissioner

Received payment January 19 1920

Charles L. Burrill Treasurer
by H. J. Miller

Tax $31,684.93 Discount $739.34—Total $30,945.59

PLAINTIFF'S EXHIBIT 22.

TREASURY DEPARTMENT INTERNAL REVENUE SERVICE
Boston, Mass. August 17, 1929.

Personal

R. M. Estes, Esquire, Deputy Commissioner of Internal Revenue, Miscellaneous Tax Unit.

I wish to call your personal attention to a little matter in connection with the above-named estate.

Sometime ago suit was brought for the recovery of a certain amount of estate tax paid in the above-named estate which was finally adjusted out of court on advice of the General Counsel, by the allowance of the amount claimed. After refund of the amount decided upon had been made, the estate filed an amended claim for refund based upon the contention that an error in the computation of the tax in the certificate of over-assessment of $1,000 had been made, and that allowance for State Inheritance Tax payments should be made. The case came to my desk while I was in the Claim Section from the General Counsel, with the instructions that the amended claim for refund should be rejected as to the claim for allowance on account of State Inheritance Tax payments, but correction of the $1,000 error in computing the

tax should be made. Accordingly I prepared a certificate of over-assessment which I believe was pending at the time I left. The matter I am particularly interested in is that the second certificate of over-assessment should bear the date of the filing of the original claim for refund, and not the date of the amended claim.

The reasons for this are that the estate has been given permission by the Court to amend its original petition by adding its claim for refund on account of the inheritance tax payments, and it will be urged that in view of the fact that the Bureau allowed the "amended claim" in part, it should also have allowed the additional amount claimed on account of inheritance tax payments, even though under the Treasury Decisions the amended claim would have been barred on account of the running of the Statute of Limitations. It is my contention, and I believe that it was the General Counsel's opinion and advice, that no part of the amended claim should be allowed, but that the original claim be corrected to the extent that correction be made on account of an erroneous computation of the tax.

GER/ath G. E. RAUSCH

[Stamped:]
Noted by Deputy Commissioner.

PLAINTIFF'S EXHIBIT 23.

TREASURY DEPARTMENT

Washington Jul 19 1929

Robert M. Leach, Executor, Estate of William E. Walker, 43 Taunton Green, Taunton, Massachusetts.

Sir: As a result of an audit of the estate tax return, Form 706, filed for the above-named estate, and a consideration of all the claims (if any) filed on behalf of the estate, a certificate of overassessment of estate tax is being prepared.

Before any portion of the overassessment can be certified

for refund, it is necessary that there be filed documentary evidence indicating the persons entitled to the refund, as follows:

(1) If the executor or administrator has not been discharged, the evidence should consist of a short-form certificate of current attestation from the probate court showing the appointment of the executor or administrator, and that the appointment remains in full force and effect.

(2) In the event the executor or administrator has been discharged and no administrator de bonis non has been appointed and qualified, there should be submitted, in lieu of the certificate above mentioned, (a) a certified copy of the court order granting the discharge, and (b) a certified copy of the order of distribution, or, if such order does not fully disclose the identity of the person or persons entitled to receive any amount that may be refunded and the percentage or proportion thereof to which each, if more than one, is entitled, there should be submitted a certified copy of the decedent's will, if any, and such further proof as may be requisite to establish both the identity of such person or persons and the percentage or proportion of the amount sought to be refunded to which each, where there are more than one, is entitled.

The documentary evidence should be forwarded to this office without delay.

Respectfully,

R. M. ESTES,

Deputy Commissioner.

BRB

PLAINTIFF'S EXHIBIT 24.

TREASURY DEPARTMENT BUREAU OF INTERNAL REVENUE

Washington September 20, 1929

Mr. O. Walker Taylor, 11 Beacon Street, Boston, Mass.

In re: Robert M. Leach *v.* Nichols, (Estate of William E. Walker)

Sir: Receipt is acknowledged of your letter of September 10, 1929, requesting a hearing on the alleged amendment to the original claim for refund in the above-entitled case.

The Bureau feels that no useful purpose would be served by granting such a hearing since you are already aware of the position taken. Your request is, accordingly, denied so far as it pertains to the above-mentioned estate.

Respectfully,

C. M. CHAREST

evp General Counsel.

OPINION.

July 24, 1930.

BREWSTER, J. This is an action brought to recover estate taxes alleged to have been erroneously exacted by the defendant.

The plaintiff's testator died November 9, 1918. The liability of the estate for an estate tax is to be determined with reference to the provisions of Revenue Acts of 1916 and 1917 (Act of September 8, 1916, 39 Stat. 777; Act of October 3, 1917, 40 Stat. 324). These statutes impose a tax measured by the "net estate" as defined therein.

The present controversy arises over the refusal of the Commissioner of Internal Revenue to deduct from the gross estate (1) the legacy and succession tax paid to the Commonwealth of Massachusetts in the sum of $34,158.59 and (2) expenses of administration incurred in prosecuting litigation resulting mainly from erroneous rulings of the Commissioner

respecting certain transfers made by the decedent during his lifetime.

The litigation is still pending and the issues now raised require a review of the history of the proceedings from their beginning.

The plaintiff duly filed his return as executor and on May 8, 1919, paid the tax shown to be due by the return.

The Commissioner, on March 18, 1922, determined the total tax due upon the estate to be $89,735.64, or $52,034.96 in excess of the tax computed upon the return. The additional assessment was due principally to the decision of the Commissioner that the transfers above mentioned were made in contemplation of death. On March 27, 1922, the balance of the total tax, as determined by the Commissioner, was paid. On June 20, 1925, plaintiff filed a claim for refund. In this claim the plaintiff requested that $60,058.03 (including interest) be refunded "or such greater amount as is legally refundable". The specific grounds for the refund assigned in this claim were two. First, that the value of the transfers was illegally included, and second, that the Federal estate tax should have been deducted from the gross estate. There were hearings on this claim, and on January 16, 1926, the plaintiff received formal notice of the rejection of his claim, although it appeared at an earlier trial that plaintiff had knowledge as early as November, 1925, that the Commissioner had decided to reject the claim. On December 1, 1925, this suit was commenced.

The plaintiff in his declaration alleged that he was seeking to recover a portion of an estate tax "wrongfully and illegally assessed against" the estate. His alleged right to recover was based upon the same grounds as those specified in his claim for refund. The defendant answered to the merits, denying all material allegations and setting up, as an agreement to settle the tax liability, a deposition made by plaintiff in November, 1921. There was a trial to a jury. The trial

judge ruled that the deposition was a complete defense and directed a verdict for defendant. On writ of error to the Circuit Court of Appeals the action of the lower court was reversed and the case was remanded for further proceedings. (*Leach* v. *Nichols*, 23 F. (2d) 275.) The decision of the Circuit Court of Appeals came down December 27, 1927. On March 6, 1928, in response to a request that the claim for refund be re-opened, hearings were held before representatives of the Commissioner at Washington, when plaintiff waived his claim to a deduction of Federal estate taxes but pressed his claim respecting the transfers. The plaintiff had not, up to this time, claimed a deduction of the Massachusetts legacy and succession tax because of a ruling of the Treasury Department promulgated September 10, 1917, which expressly prohibited such deduction. (T. D. 2524.) At these hearings the plaintiff claimed that Massachusetts taxes should be deducted and requested further deductions of administration expenses incurred in connection with the litigation and of an additional executor's fee. The total amount subsequently paid on account of these expenses and charges was approximately $30,000. The Massachusetts legacy and succession tax was paid prior to January 20, 1920, but the additional executor's fees, counsel fees and other administration expenses were not paid until July, 1928.

On April 26, 1928, plaintiff was advised that the claim for refund would be reopened and allowed to the extent of excluding from the gross estate the transfers previously held taxable, and on July 3, 1928, a certificate of over-assessment of $43,865.37 was issued, and that amount with interest was refunded. Due to an error in computation this amount was $1,000 less than the correct amount.

In the meantime the Court of Claims in Merrill *v.* United States (Court of Claims, decided June 18, 1928), following this court in *Thayer* v. *Malley*, 3 F. (2d) 194, had decided that the amount paid on account of Massachusetts taxes was

a proper deduction from the gross estate, and the Commissioner had acquiesced in this decision. Nevertheless, he refused to make any deduction for these state taxes, or to increase the amount of deductible administration expenses.

On September 28, 1928, plaintiff filed a motion to amend his declaration in the above-entitled action by alleging new grounds for recovery of taxes illegally and wrongfully collected. These new grounds were that in arriving at the net estate the Commissioner had not deducted enough for executor's fees, for counsel fees, for incidental expenses of administration and had made no deduction of the Massachusetts legacy tax. This amendment was allowed October 8, 1928. On April 27, 1929, the plaintiff filed with the Collector an amendment to his claim for refund which was received without objection. In this amended claim the grounds for refund were the same as in the amended declaration with the addition of a claim for the $1,000 resulting from the erroneous computation of the tax at the time of the redetermination. This claim for a refund was considered and rejected except as to the claim for $1,000 in August, 1919. On or about August 21, 1929, the Commissioner redetermined the total tax upon the said estate to be $48,001.29 instead of $49,001.29, as shown by his determination of May 28, 1928, and refunded the tax of $1,017.38 together with interest thereon amounting to $449.48.

The certificate of overassessment was issued in the usual form, reciting that an "audit of the return" and "a consideration of all claims . . . filed by" plaintiff indicated that the tax assessed was in excess of amount due. The certificate, however, gave the date only of the original claim and ignored the amendment to the claim.

To plaintiff's amended declaration the defendant answered to the merits.

In addition to a general denial of all allegations the defendant in his answer set up three defenses, (1) that plaintiff had

not complied with the provisions of Section 3226 of the Revised Statutes, as amended by Section 1014 (a) of the Revenue Act of 1924, in that the original claim for refund did not contain all the facts relied upon in support of the claims being pressed by plaintiff in his amended declaration; (2) that the administration expenses were paid subsequent to the bringing of this action; and (3) that the taxes were paid prior to June 2, 1924, the effective date of the Act of 1924, and were paid without protest.

Jury trial having been waived, the case was submitted on agreed facts and evidence supplementing the statement.

It is obvious that the United States had demanded and received a tax levied upon the estate of plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court.

Defendant now seeks to defeat a recovery of this illegally exacted tax by urging,

(1) That the court is without jurisdiction to entertain the suit since it was prematurely brought;

(2) That no claim for refund upon the grounds now relied upon was filed within four years from date of payment of the tax.

Other objections to plaintiff's suit were raised in the pleadings and in argument, but the above are the only defenses that merit consideration. A denial of substantial rights, based on purely technical grounds of a relatively insignificant character, is a result to be avoided if possible. If further amendments are necessary to bring the allegations of the declaration in conformity with facts admitted by the defendant, the law will permit such amendments. In any event I have elected to dispose of this controversy on its merits but with a due regard for the statutory limitations presently to be considered. Minor errors or irregularities in these proceedings I am inclined to overlook.

I regard the defense, so far as it stands on the failure of

the plaintiff to formally protest the payment of the tax, as now waived since it was not treated in defendant's briefs. In any event I must regard the defense as untenable, in view of the provisions of R. S. Sec. 3226, as amended by Sec. 1014 (a) of the Revenue Act of 1924.

Beatty v. *Heiner*, 10 F. (2d) 390;
Warner v. *Walsh*, 24 F. (2d) 449.

First, as to the jurisdictional question. It will be noted that it was not until the second trial on the merits had begun that this question was raised. The provision of statute invoked is in Section 3226, as amended, which reads in part that "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim" (for refund) "unless the Commissioner renders a decision thereon within that time . . . ".

The defendant contends that since the claim was filed June 20, 1925, a suit brought within six months after that date must be dismissed at this late date. From the record of the first trial, it appears that the plaintiff had been advised of an adverse decision on his claim before suit was brought. The declaration so alleges. If the defendant desired to deny this allegation, he could have done so by a plea in abatement raising the issue of fact. Having failed to do so, no question of jurisdiction can now be raised on this record. This court had jurisdiction of the subject-matter and of the parties. This is not a case where the question of jurisdiction can be raised at any stage of the proceedings, however late. The answer to the merits and trial thereon constitute a waiver of any right to now set up the claim that the suit was prematurely brought.

For his second line of defense the defendant invokes R. S. Sections 3226 and 3228, as amended by Sections 1014 (a) and 1012 of the Revenue Act of 1924 (43 Stat. 253). Briefly, these sections provide that a claim for refund "duly filed with the

Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof"; shall be a condition precedent to the right to recover by suit taxes illegally collected (Sec. 1014 (a)), and that all such claims for refund must be presented to the Commissioner within four years next after the payment of the tax (Sec. 1012). Article 1306 of Regulation 65 (under the Revenue Act of 1924) in part reads as follows: "Claims by the taxpayer for the refunding of taxes . . . erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath."

In the case at bar, the claim for refund filed June 20, 1925, conformed to the requirements of the Statutes and Regulations. The facts set forth, however, did not afford any basis for the claims which are asserted in plaintiff's amended declaration. But while this first claim was pending, an amendment to it was filed in which the plaintiff claimed not only the balance due under previous adjustments made on the original claim, but also claimed refunds based on the refusal of the Commissioner to deduct from the gross estate the sum paid in settlement of the Massachusetts legacy and succession tax and the increased expenses of administration. This amendment moreover was but a formal presentation of claims for refund that had been informally presented and discussed at hearings held upon the original claim when it was reopened after the decision of the Circuit Court of Appeals. At these conferences the whole extent of the liability of the estate for the Federal estate tax was considered, and the Commissioner, or those who represented him, had abundant opportunity to pass upon the right of the estate to claim the deduction in question.

The precise problem presented by this second defense is whether the requirements of the statutes, above noted, are satisfied by a claim seasonably filed and amended after the

four year limitation, the amendment specifying new grounds arising both before and after the expiration of that period, and having been filed and the grounds considered before the final determination of the tax.

That such a right to amend exists in a proper case was held in *Lehigh & Wilkesbarre Coal Co.* v. *United States*, 38 F. (2d) 637.

See also *Felt & Tarrant Mfg. Co.* v. *United States*, 37 F. (2d) 977. In the Coal Company case, a claim for refund in terms too general to comply with the regulations was filed within the limited period, and later amended by specifying the particular grounds for the claim. The contention of the United States was that there could be no recovery since the amendments were filed after the expiration of the time allowed for presenting claims. This contention did not prevail.

In the case at bar, the amount of the refund claimed in the first claim filed was the amount legally refundable, and the amendment only operated to submit to the Commissioner formally what had already been informally presented at hearings on the re-opened original claim, namely, additional grounds for claiming a return of the amount legally refundable. There was evidence tending to show that it had been the policy of the Commissioner, in dealing with estates of deceased persons, to accept claims in more or less general terms and permit specifications to come later. It has been urged, and I think appropriately, that in a matter involving an estate tax, it would be peculiarly compatible with justice to give effect to such an amendment inasmuch as the statute lays upon the Commissioner the positive duty of assessing the correct tax and refunding any excess. To hold that a late amendment to a claim filed on time answers the statute, does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determina-

tion of the tax liability, and before suit is brought to recover any tax illegally collected.

Tucker v. *Alexander*, 275 U. S. 228;
Red Wing Malting Co. v. *Willcutts*, 15 F. (2d) 626;
Felt & Tarrant Mfg. Co. v. *United States*, *supra*.

The case at bar is clearly distinguishable from *Arizona Commercial Mining Co.* v. *Casey*, 32 F. (2d) 288. In that case the claim in question was first asserted in the suit, and the Commissioner never had an opportunity to deal with it. Moreover, the tax there involved was income and excess profits tax and not an estate tax. In the case at bar, not only did the Commissioner, or his representatives to whom he assigned the duty of investigating the tax liability of the estate, have knowledge of the payment of these state taxes, but, as already intimated, a right to their deduction was urged upon him at hearings on the refund claim and in an amendment to it.

Nor do I think the plaintiff should be prejudiced by his failure to include in the original claim for refund a claim based on the refusal of the Commissioner to deduct the Massachusetts tax. The published opinions and rulings of the Commissioner extant when the claim was filed precluded, so far as the taxing authorities were concerned, all hope and expectation of such a deduction from the gross estate. The law does not require an act that would have been idle or useless at the time.

Felt & Tarrant Mfg. Co. v. *United States*, *supra*.

I have reached the conclusion that the defense of non-compliance with the statutes and regulations respecting the claim for refund cannot prevail, and that to the extent that the claimed deductions were legally deductible when the tax was finally determined, they should have been deducted. So far, therefore, as the tax is increased by the failure to make such lawful deductions, the excess may be recovered in this action.

Regarding the Massachusetts legacy and succession tax, there can be no question that it was legally deductible. It had been paid within the period of limitation, in fact before the first claim was filed. The claim is one that arose well within the four years.

The expenses of administration, however, stand on somewhat different grounds. They were not deductible until paid and they were not paid during the four year period. These claims, therefore, did not arise until after the time for presenting claims had expired. It had been held in other jurisdictions that executors' fees, paid after the four year period, were not deductible.

Ordway v. *United States*, 37 F. (2d) 19;
Braun et al. v. *Llewellyn*, 38 F. (2d) 477.

It is thought that one of the results of the limitations of the statute is to fix definitely the time within which executors or administrators are required to secure the allowance and payment of administration fees and expenses. In *Braun et al.* v. *Llewellyn, supra*, the court observes that: "The practical effect of this statutory limitation is that the executors have four years from the date of the payment of tax in which to get their administration expenses allowed and paid; and if they are not able to close their estates within that period, the expenses incurred and paid after that period cannot be claimed by way of a refundment." I can see no escape from the conclusions reached in the cited cases. The fact that the expenses were increased by litigation to correct errors of the Commissioner would not, in my opinion, be sufficient to justify any other conclusion.

In conclusion, I rule that the plaintiff is entitled to recover a judgment in this action, but only to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts. There was no agreement in the statement of agreed facts as to the amount of such excess, and I will

ask the parties to stipulate respecting the amount, computed in accordance with my decision. I have no doubt they can agree, but if they are unable to do so, I will grant a further hearing upon the exact amount for which judgment may be entered in favor of the plaintiff.

DEFENDANT'S PETITION FOR APPEAL.

[Filed January 29, 1931.]

Now comes the defendant, Malcolm E. Nichols, former Collector of Internal Revenue for the Third District of Massachusetts, and feeling himself aggrieved by the order and judgment made and entered in this court on January 29, 1931, in favor of the plaintiff and against the defendant, hereby appeals from said order and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons set forth in the assignment of errors filed herewith.

Wherefore the defendant prays that his appeal be allowed and citation issued as provided by law, and that a transcript of the record, proceedings and all other papers of which said judgment and order were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit under the rules of said court and in accordance with the law in such case made and provided.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

January 29, 1931. Petition for appeal allowed.

ELISHA H. BREWSTER,
United States District Judge.

DEFENDANT'S ASSIGNMENT OF ERRORS.

[Filed January 29, 1931.]

The defendant in this action in connection with his petition for appeal makes the following assignment of errors which he avers occurred upon the trial of this case, to wit:

1. The District Court erred in granting plaintiff's motion to amend his declaration by setting up new grounds for recovery of taxes alleged to have been illegally and wrongfully collected, no claim for refund on any such grounds having been made to, or filed with, the Commissioner of Internal Revenue prior to the expiration of the time prescribed by law within which to file such claim, or prior to the commencement of this action, or prior to the granting of plaintiff's motion to amend his declaration.

2. The District Court erred in holding that: "On April 27, 1929, the plaintiff filed with the Collector an amendment to his claim for refund which was received without objection. In this amended claim the grounds for refund were the same as in the amended declaration, with the addition of a claim for the $1,000 resulting from the erroneous computation of the tax at the time of the redetermination. This claim for a refund was considered and rejected except as to the claim for $1,000 in August, 1929."

3. The District Court erred in holding: "It is obvious that the United States had demanded and received a tax levied upon the estate of plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court."

4. The District Court finds that "On June 20, 1925, plaintiff filed a claim for refund"; that "There were hearings on this claim, and, on January 16, 1926, the plaintiff received formal notice of the rejection of his claim, although it appeared at an earlier trial that plaintiff had knowledge as early as November, 1925, that the Commissioner had decided

to reject the claim. On December 1, 1925, this suit was commenced"; that "The provision of statute invoked is in section 3226, as amended, which reads in part that: 'No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim' (for refund) 'unless the commissioner renders a decision thereon within that time . . .'."

The District Court erred in holding: "This court had jurisdiction of the subject matter and of the parties. This is not a case where the question of jurisdiction can be raised at any stage of the proceedings, however late. The answer to the merits and trial thereon constitute a waiver of any right to now set up the claim that the suit was prematurely brought."

5. The District Court erred in denying defendant's motion to dismiss the action for want of jurisdiction.

6. The District Court erred in holding: "To hold that a late amendment to a claim filed on time answers the statute does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determination of the tax liability, and before suit is brought to recover any tax illegally collected."

7. The District Court erred in holding that plaintiff should not "be prejudiced by his failure to include in the original claim for refund a claim based on the refusal of the Commissioner to deduct the Massachusetts tax. The published opinions and rulings of the Commissioner extant when the claim was filed precluded, so far as the taxing authorities were concerned, all hope and expectation of such a deduction from the gross estate. The law does not require an act that would have been idle or useless at the time."

8. The District Court erred in holding "that the defense of noncompliance with the statutes and regulations respecting claim for refund cannot prevail, and that, to the extent

that the claimed deductions were legally deductible when the tax was finally determined, they should have been deducted, So far, therefore, as the tax is increased by the failure to make such lawful deductions, the excess may be recovered in this action."

9. The District Court erred in holding: "Regarding the Massachusetts legacy and succession tax, there can be no question that it was legally deductible. It had been paid within the period of limitation, in fact before the first claim was filed. The claim is one that arose well within the four years."

10. The District Court erred in holding " that the plaintiff is entitled to recover a judgment in this action, . . . to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts".

11. The District Court erred in granting judgment for the plaintiff " to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts".

12. The District Court erred in not granting judgment for the defendant dismissing plaintiff's declaration, as amended, and this action, with his costs and disbursements.

Wherefore the defendant prays that the judgment of the District Court be reversed.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To ROBERT M. LEACH, *Executor of the Estate of William E. Walker, deceased,* GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the twenty-eighth day of February next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Malcolm E. Nichols, former Collector of Internal Revenue for the Third District of Massachusetts, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable ELISHA H. BREWSTER, Judge of the District Court of the United States for the District of Massachusetts, this twenty-ninth day of January, in the year of our Lord one thousand nine hundred and thirty-one.

ELISHA H. BREWSTER,
United States District Judge.

ACKNOWLEDGMENT OF SERVICE OF CITATION ON APPEAL.

FEBRUARY 7, 1931.

Robert M. Leach, Executor of the Estate of William E. Walker, deceased, by his attorney, hereby acknowledges service of the within citation on appeal.

O. W. TAYLOR,
Attorney for Appellee.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record on the appeal of the defendant, in the cause entitled,

No. 2700, LAW DOCKET.

ROBERT M. LEACH, EXECUTOR OF THE ESTATE OF WILLIAM E. WALKER, PLAINTIFF,

v.

MALCOLM E. NICHOLS, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT,

in said District Court determined, together with the original citation with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this sixteenth day of March, A. D. 1931.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order for enlargement of time for docketing case to, and including March 16, 1931, is here omitted. A. I. CHARRON, *Clerk.*]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1930

No. 2554

MALCOLM E. NICHOLS, Formerly Collector of Internal Revenue, Defendant, Appellant,

v.

ROBERT M. LEACH, Executor, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Anderson, and Wilson, JJ.

OPINION OF THE COURT—June 10, 1931

WILSON, J.:

This is an appeal from the District Court in an action originally brought by the executor to recover an overpayment of a Federal estate tax on the estate of William E. Walker, late of Taunton, Massachusetts, who died in November, 1918.

In May, 1919, the executor filed a return and paid an estate tax of $37,700.68 assessed upon his return. He later received a notice from the Commissioner of Internal Revenue's office that an additional tax would be claimed and in March, 1922, the Commissioner made a final decision that the total tax due from the estate was $89,735.64; whereupon the executor having previously paid $50,000 to stop the running of interest, paid the additional amount claimed by the government, together with the interest due.

The difference between the executor and the Commissioner as to the amount of the tax due arose in the first instance over a large amount of property given by the testator within two years of his death to members of his family. The value of the gifts totalled over $400,000.

A claim for refund was filed by the executor in June, 1925, to the amount of $49,634.70, and interest to the amount of $10,423.39, setting forth as grounds for the claim (1) that none of the gifts were made by the decedent in contemplation of death, and (2) that a deduction should have been made of the amount of the Federal estate tax.

At a conference in Washington between the Commissioner and the executor and his attorneys on November 16, 1925, at which they were advised that by the executor filing what is denominated an Estate Tax Deposition in November, 1921, he had barred the estate from obtaining any refund on the grounds claimed and the case was thereby closed; whereupon on December 1, 1925, the executor brought this action, and on March 16, 1926, filed the original declaration in the suit which was based on the grounds set forth in his claim filed in June, 1925. The case was heard on this declaration in the District Court in November, 1926, and, on the ground that the Estate Tax Deposition barred the plaintiff from recovery, judgment was ordered for the defendant.

On appeal this judgment was reversed in December, 1927, and the case sent back for further hearing.

In March, 1928, following the decision of this court reversing the judgment of the District Court, counsel for the executor requested the Commissioner to reopen the case and sought an interview with him in Washington, at which interview the question of the refund was discussed with other members of his staff, and the Commissioner's attention was for the first time called to the fact that no allowance had been made for the payment of the Massachusetts inheritance taxes. Counsel, however, were informed that under a ruling by the Treasury Department, No. 2524, it was not deductible.

In July, 1928, the Commissioner, having reopened the case, ordered that a refund be made to the amount of $43,865.37, on the ground that the gifts were not in contemplation of death, but no deduction was made for the Federal estate tax, which was in accordance with the holding of this court in Old Colony Trust Co. v. Malley, 19 Fed. (2d) 346.

In September, 1928, the plaintiff presented an amendment to his declaration in the original suit, which was allowed in the District Court, setting forth as further grounds of recovery, that since the original assessment additional compensation had been paid to the executor and to his attorneys in the settlement of the estate; and the executor had also paid other miscellaneous administration expenses in addition to those deducted by the Commissioner in the original assessment; and that in arriving at

the net estate upon which the estate tax was computed the Commissioner has refused to deduct the amount paid by the executor to the State of Massachusetts as inheritance taxes to the amount of $34,158.59.

To the amended declaration the appellant filed an answer and set up as a defense that in the claim for a refund filed in June, 1925, the only ground set forth was that certain gifts were improperly included in the gross estate as being made in contemplation of death, and that no deduction was allowable for a federal estate tax; and that the original claim filed in June, 1925, did not furnish a sufficient ground for the recovery of any additional amounts due to any sums paid to the executor, to attorneys and for administration expenses after the four years limitation period for filing a claim for a refund, or for any amount because of a failure to deduct the Massachusetts inheritance taxes; and that as to the above items the claim for a refund filed in June, 1925, did not conform to Sec. 3226 R. S. as amended by the Rev. Act of 1924, Sec. 1012, and to Treasury Regulation 68, Art. 99.

In May, 1929, three years after the time for filing a claim for a refund had expired under the statute, and more than three years after this action was brought, and seven months after the amendment to his declaration was allowed, in which it was not set forth that a claim for a refund on the new grounds had been filed, the executor filed with the collector what he described as an "Amendment to Claim for Refund of Taxes illegally collected," which set up a claim for over-assessment of $1,000 in the original assessment, and also for a refund based on the last four grounds set forth in his amended declaration.

In July, 1929, the Commissioner issued his certificate for a refund of $1,000, which overassessment was due to mathematical errors in computing the refund allowed in July, 1928.

In February, 1930, the case came on for trial before the District Judge, a jury being waived in writing. Before the trial and at its close, the defendant moved to dismiss the action for lack of jurisdiction on the ground that the action was prematurely brought, which was refused.

The defendant also filed a motion at the opening of the second trial that the action be dismissed on the ground that the declaration failed to set up that any claim for refund

on the new grounds set forth in the amended declaration had been filed with the Commissioner prior to the commencement of the action or prior to the date of the amendment to the declaration in September, 1928, and at the close of the evidence renewed the motion on the ground that the evidence showed that no claim for a refund on the new grounds was presented within four years of the payment of the tax, or prior to the bringing of the action or the date of the amendment.

After the hearing which was based in part on an agreed statement of facts, and in part on evidence oral and documentary, the District Judge held that jurisdiction of the District Court was established, since the evidence disclosed a decision by the Commissioner denying the claim for a refund within six months of the filing of the claim and prior to the beginning of the action, though the Commissioner's formal certificate of denial was not issued until January, 1926, after the action was begun on December 3, 1925.

The only real issues in the case are (1) whether after four years from the date of a payment of a tax a new claim for a refund based on new grounds in the guise of an amendment to the original claim satisfies the statute; (2) whether the taxpayer can recover on a declaration which does not allege that a claim for a refund on the grounds relied upon in the declaration has been filed with the Commissioner before action was brought, or the amendment to the declaration setting up the new grounds was allowed; (3) whether a verbal suggestion at a conference with the Commissioner that there were other grounds for a refund not presented in the original claim is sufficient because the Commissioner is required to determine the estate tax; and (4) whether, if the statute requiring the filing of a claim stating the facts on which the refund is claimed, has been complied with, the Massachusetts inheritance tax should be deducted from the gross estate in arriving at the estate tax.

That amendments to a claim may be allowed within the four year period, and that a Commissioner may waive the provision of the regulations as to the form of a claim is settled; but whether the four year period is a period of limitation as to any new grounds not included in the original claim, which cannot be waived, is not clear. Felt v.

Tarrant Mfg. Co., decided April 13, 1931; United States v. Swift & Co., 282 U. S. 468; Finn v. United States, 123 U. S. 227.

The cases in which the Supreme Court has considered this statute are Rock Island, etc., R. R. Co. v. United States, 254 U. S. 141; Maryland Casualty Co. v. United States, 251 U. S. 342, 353, 354; Kings County Savings Instit. v. Blair, 116 U. S. 200; Nichols v. United States, 7 Wall. 122, 130; Tucker v. Alexander, 275 U. S. 228; Felt v. Tarrant Mfg. Co., supra; and United States v. Swift & Co., supra.

However, it is unnecessary to determine whether a claim for refund can be amended by inserting entirely new grounds after the four year period of limitation has expired, as we think the District Court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case, as all the other claims for refund in the amended declaration were properly disallowed.

The statutes involved are 203 (a) (1) of the Revenue Act of 1916, and Sec. 403 (a) (1) of the Revenue Act of 1918.

Sec. 203 (a) (1) of the Revenue Act of 1916 reads as follows:

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, *and such other charges against the estate as are allowed by the laws of the jurisdiction,* whether within or without the United States, under which the estate is being administered." (Italics supplied.)

The ejusdum generis rule of construction, unless Congress clearly intended otherwise, requires that the phrase "and such other charges against the estate" should be construed to include only such charges as are similar in character to those which have been enumerated before, and

are ordinarily allowed in a court of probate. Black on Interpretation of Laws, Chap. 5, Sec. 63.

The Treasury Department followed the rule in its Regulation 2524, adopted September 10, 1917: "An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or legacy taxes are not such other charges against the estate as are allowed by the laws of the jurisdiction,' and accordingly are not deductible in arriving at the amount of Federal estate tax. T. D. 2395 of November 19, 1916, is hereby revoked."

Congress in the 1918 Act, Sec. 403, also clearly indicated that it was the correct rule of construction.

Sec. 403 of the Revenue Act of 1918 (a). (1) provided:

"That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, *but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes.*" (Italics supplied.)

That it was not intended by Congress by the addition of the provision in italics in Sec. 403 (a) (1) of the Act of 1918, expressly excluding succession taxes from the items deductible from the gross estate, to make any change in this respect in the Act of 1916, the report of the Committee on Ways and Means in recommending the change to Congress makes clear.

The Congressional Committee reporting the Revenue Act of 1918 to the House stated in explanation: "Section 403, which takes the place of Section 203 of the original Act

(1916) defining the deductions for the purpose of arriving at the net estate, inserts a provision that income taxes upon income received after the death of the decedent, and *estate, succession, legacy* or *inheritance* taxes, are not to be deducted. Obviously, income taxes should not be deducted, for the reason that they are payable from and on account of income which is not included in the gross estate. Inheritance taxes payable to states are payable in respect to the benefits derived by individual legatees and beneficiaries, *and are not known until estate taxes have been ascertained.* These provisions are in conformity with existing rulings in the administration of the law, which rulings the committee thinks are in accord with the statute, and are now included for the sake of clarification, as in the case of additions made to section 402 mentioned above." (Italics supplied.)

The nature of the Massachusetts tax has been definitely settled, see Attorney General v. Stone, 209 Mass. 186; Boston Safe Dep. & Tr. Co. v. Com'r. Corp. & Tax, 267 Mass. 240, which construction was adopted by the United States Supreme Court in Saltonstall v. Saltonstall, 276 U. S. 260, and many other Massachusetts cases, viz: that it is an excise tax on the right to receive property by will, inheritance or gift, is assessed on the value of the legacy or gift or amount received by the legatee, distributee or donee, and is ultimately payable by the recipient. G. L. Mass. 1921, Chap. 65, Secs. 17-21.

The provision in the Massachusetts statutes since 1907 that it shall be paid by the executor or administrator is evidently for the convenience and security of the State in collecting the tax. In 1902 the statute expressly provided that it should be paid by the legatee or donee. It has not, we think, become a charge upon the estate within the meaning of Sec. 203 (a) (1) of the Revenue Act of 1916, because under Chap. 563 of P. L. Mass. 1907, Sec. 4, and the later Acts, it is now required to be paid by the representative of the estate and then deducted from the legacy or distributive shares. See Secs. 9, 10 of Act of 1907.

The court in Attorney General v. Stone, supra, in speaking of the Act of 1902, said at page 191:

"By the third change, a personal liability for the tax is imposed upon the defendant. But this puts no greater burden upon him. Formerly the tax would have been

paid by the administrator, and the defendant would have received so much less. By the new statute, he receives the full amount bequeathed to him, and must himself pay the tax. He is required to pay into the public treasury only the additional amount which by the statute he receives directly from the trustee and indirectly from the administrator. He is not harmed by this. Moreover, he is merely subjected to the payment of an excise tax *upon the privilege of receiving property bequeathed to him,* and is required to pay it only when he is allowed by our laws to have the actual enjoyment of this privilege." (Italics supplied.)

"It is settled," said the Massachusetts court in Boston Safe Dep. & Tr. Co. v. Com'r Corp. & Tax, supra, "that the excise thus authorized 'is a tax upon "succession" which includes the privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property' * * * we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, * * * but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the State whether occasioned by death, Stebbins v. Riley, 268 U. S. 137, or effected by deed, Keeney v. New York, 222 U. S. 525; Chanler v. Kelsey, 205 U. S. 466; Nickel v. Cole, 256 U. S. 222. The present tax is not laid on the donor, but on the beneficiary. * * * "

"In this and earlier cases," said the United States Supreme Court in Saltonstall v. Saltonstall, supra, at page 269, "the Massachusetts court has held that the tax authorized by these statutes is a tax upon 'succession' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' See Attorney General v. Stone, 209 Mass. 186, 190; Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267."

The Federal statute seeks to reach only the total net estate transmitted at death, the payment by the representative of an estate of a succession tax which is eventually deducted from the legatee's or distributee's share does not lessen the net estate that passed at death and on which the Federal estate tax is computed. In case of a

will the amount passing to the legatees, or in case of intestate property, the net estate actually passing at death to the distributees under the Massachusetts statutes, remains the same whether the legatees and distributees pay the tax directly or indirectly.

In New York Trust Co. v. Eisner, 256 U. S. 345, 349, the Supreme Court held, following the construction of the New York statute in the Matter of Gihon, 169 N. Y. 443, that the New York transfer tax should not be deducted in determining the Federal estate tax, on the ground that it was not payable out of the estate. In this case Justice Holmes, who spoke for the court, said, referring to section 203 (a) (1) of the 1916 Act:

"For if the tax attaches to the estate before distribution —if it is a tax on the right to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. 'Charges against the estate' as pointed out by the Court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. *This reasoning excludes not only the New York succession tax but those paid to other States, which can stand no better than that paid in New York.*" (Italics supplied.)

In Keith v. Johnson, Adm'x, 271 U. S. 1, which related to the assessment of the Federal income tax and followed later decisions by the New York courts, the transfer tax of that state was held to be deductible from the estate before anything passed to the legatee and therefore should be deducted in determining the Federal income tax. Since that decision, however, the Court of Appeals of New York (Cardoza, C. J.) has held in the Matter of Oakes, 248 N. Y. 280, that the New York transfer tax is payable by the legatee or donee, and the Federal estate tax by the residuary legatees or out of the estate. Under the rule the Federal Supreme Court laid down in both the Eisner and Keith cases, and in many others, see Saltonstall v. Saltonstall, supra; Stebbins v. Riley, supra, it may be assumed that it will now follow the latest decision of the New York court in the Matter of Oakes, and hold that the New York transfer tax should not be deducted. The ruling in the Keith case did not reverse the ruling in the Eisner case.

It merely followed the last construction of the New York statute by the local courts.

However, this court in Old Colony Trust Co. v. Malley, 19 Fed. (2d) 346, held in principle, if not expressly, that Massachusetts succession taxes should not be deducted in arriving at the net estate of a decedent. It was determined in that case that the provision in Sec. 403 (a) (1) of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in Sec. 203 (a) (1) of the Act of 1916; that it was, as the committee of Congress stated at the time the change was proposed, merely "intended for the sake of clarification."

While that case applied to Federal estate taxes, this court pointed out in its opinion the difficulty of deducting a tax before the amount could be determined, except by an algebraic formula. It would be just as difficult to deduct succession taxes on residuary legacies, or on distributive shares in case of an intestate estate before determining the amount of the Federal estate tax, since the exact amount of the succession tax in either case cannot be computed until the Federal estate tax has first been deducted and the residuum determined. The same argument against the deduction of the estate tax in determining the net estate so cogently applied in the Old Colony Trust Co. case, therefore applies with equal force to the deduction of a succession tax when it is ultimately paid by the recipient. It should not be presumed that Congress intended that a tax statute should be construed so as to render it necessary to resort to algebraic equations to determine a tax. Edwards v. Slocum, 287 Fed. 651; also see Edwards v. Slocum, 264 U. S. 61. The result of the plaintiff's contention is that succession taxes on residuary legacies and on the distributive shares of an intestate estate would be, in part, measured by the tax itself, which, we think, was not contemplated by the Massachusetts statute as construed by its courts.

Thus the authorities, we think, sustain the Government's contention that the inheritance or succession taxes of Massachusetts should not be deducted. Since the Federal courts follow the state courts in the interpretation of state laws, it is futile to try to harmonize the results of the decisions of the Supreme Court or of the several Circuit

Courts of Appeals, where the opinions are based on local statutes as interpreted by local courts. Stebbins v. Riley, 268 U. S. 137, 146; New York Trust Co. v. Eisner, 256 U. S. 345; Keith v. Johnson, Adm'x, 271 U. S. 1.

Therefore, if we follow the construction of the Massachusetts statutes by the Massachusetts courts and the principles laid down by this court in Old Colony Trust Co. v. Malley, supra, and may apply the language of Justice Holmes in New York Trust Co. v. Eisner, quoted above, it must be held that the Massachusetts succession taxes are not deductible in this case.

The judgment of the District Court is reversed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1930.

No. 2554.

MALCOLM E. NICHOLS,
FORMERLY COLLECTOR OF INTERNAL REVENUE,
DEFENDANT-APPELLANT,
v.
ROBERT M. LEACH, EXECUTOR,
PLAINTIFF-APPELLEE.

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING.

Now comes Robert M. Leach, executor of the Estate of William E. Walker, plaintiff-appellee in the above entitled cause, being greatly aggrieved by the opinion rendered herein, on June 10, 1931, reversing the judgment of the District Court, and respectfully petitions this Honorable Court for a rehearing on this case for the following reasons:

GROUNDS FOR REHEARING.

I.

Your petitioner has never been afforded a fair and reasonable opportunity, before this Honorable Court, to present his side of the question of whether or not the Massachusetts inheritance tax was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as amended, which seems to be the sole ground upon which the judgment of the District Court was reversed, the circumstances being as follows:

FIRST. The record of the trial below clearly reveals that the question of whether or not the Massachusetts inheritance tax was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as amended, was not presented for the decision of the District Court, because:

1. That question is not raised in any of the technical defenses set forth in the defendant's answer to the plaintiff's amended declaration (Rec. pp. 19–20).

2. In the typewritten brief (pp. 9–11) which the defendant-appellant submitted to the District Court the specific questions presented for decision, and the statutes and regulations presented for the interpretation of that Court, are stated as follows:

"THE QUESTIONS PRESENTED.

"(1) Has this Court any jurisdiction of this action?

(2) Does the declaration as amended state facts sufficient to constitute a cause of action?

(3) Is a taxpayer entitled to recover any portion of a Federal estate tax on grounds other than those which are expressly specified in his claim for refund where no claim for refund on such other grounds was filed within the time prescribed by law?"

"THE STATUTES INVOLVED.

"The pertinent sections of the Revenue Act of 1924 (43 Stat. 253–355) involved in this case are as follows:

"SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:"

"The pertinent sections of the Revenue Act of 1926 (44 Stat. 9–131) are as follows:

"SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

Section 1113 of the Revenue Act of 1926 reenacted section

3226 of the Revised Statutes as amended by section 1014 of the Revenue Act of 1924 (*supra*) without change."

"REGULATIONS INVOLVED.

"The Regulations adopted by the Secretary of the Treasury pertinent to the case at bar are as follows:

Regulations 65 (under the Revenue Act of 1924):

"ART. 1306. *Claims for refund of taxes erroneously collected.*

Regulations 69 (Under the Revenue Act of 1926):

"ART. 1304. *Claims for refund by taxpayers.*"

3. At the oral argument counsel for the Government admitted and conceded in open court that the Government did not there raise the question as to whether or not the Massachusetts inheritance tax was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as amended, for, at the very beginning of the trial, the Court with specific reference to that question asked, and counsel replied (Sten. Rec. p. 5), as follows:

"The COURT. Apart from technicalities, and getting at the justice of the thing, you have collected some taxes you ought not to have in view of the decisions of the Court in regard to deducting the collected State taxes?

Mr. SABINE. There is no doubt that the Massachusetts Inheritance Tax has been held to be deductible from the gross estate."

THIRD. Among the cases which have held that the Massachusetts inheritance tax, as well as that of other states, was a proper deduction under Section 203 of the Act of September 8, 1916, as amended, and which your petitioner conceived to be contemplated in the foregoing question and answer are the following:

Massachusetts:

Thayer et al. v. *Malley*, 3 Fed. (5) 194; no appeal taken.
Merrill et al. v. *United States*, 66 Ct. Cls. 136; no appeal taken.

Old Colony Tr. Co. v. *Nichols*, Ct. Cls. No. J-617. Settled out of Court; deduction of Massachusetts inheritance tax allowed, and refund granted, on the authority of the Merrill decision, *supra*. (See appellee's brief, pp. 47–48.)

Pennsylvania–Lederer v. *Northern Tr. Co.*, 262 Fed. 52; certiorari denied, 253 U. S. 487; 40 S. Ct. 483.

Maryland–Curley v. *Tait*, 276 Fed. 845, affirmed by *Miles* v. *Curley*, 291 Fed. 761.

Utah–Kearns v. *Dunbar*, 292 Fed. 1013; no appeal taken.

New York–Keith v. *Johnson*, 271 U. S. 1, overruling *New York Trust Co.* v. *Eisner*, 256 U. S. 345.

Other States:

While cases for other states are not reported, it is a matter of common knowledge that, after the decision of the Supreme Court in the case of *Keith* v. *Johnson*, *supra*, and that of the Court of Claims in *Merrill et al.* v. *United States*, *supra*, it was the admitted policy of the Commissioner to allow the estates of all other states the benefits of the deduction, of such state inheritance taxes under Section 203 of the Act of September 8, 1916, as amended, and that shortly after the time for appeal in the Merrill case had expired (September 18, 1928) the Treasury Department (October 23, 1928) promulgated Treasury Decision 4235 (Cumulative Bulletin VII-a, July–December, 1928, pp. 76–77) under the authority of which many estates claimed the deduction of state inheritance taxes under Section 203 of the Act of 1916 and were granted refunds even though the statutory period of limitation for bringing suit had expired; the pertinent parts of T. D. 4235 are:

"(a) If a claim for refund or credit of an Internal revenue tax was disallowed prior to May 29, 1928, and if the period of limitation for bringing suit in court had expired, such claim will be reopened if, but only if . . .

(2) *The refund or credit is properly allowable under a court decision or a decision of the Board of Tax Appeals* and a case or an appeal involving the point upon which the refund or

credit is allowable was pending after the disallowance of the claim and prior to the expiration of such period of limitation; or . . ." (Italics ours.)

If the defendant had contended in the Court below that the Massachusetts inheritance tax was not such proper deduction your petitioner was in a position and ready to show, by competent testimony and documentary evidences, specific instances where the Commissioner after the decision of the Supreme Court in *Keith* v. *Johnson*, *supra*, and in the *Merrill case*, *supra*, has granted large refunds by allowing the deduction of state inheritance taxes under Section 203 of the Act of 1916, to wit:

1. In the Estate of Morton G. Plant a refund of over $150,000.00 was allowed that estate on account of the deduction of the inheritance taxes paid to the States of New York, Connecticut and Utah.

2. In the Estate of Charles G. Roebling, a refund of over $90,000.00 was granted on account of the deduction of the New Jersey inheritance tax.

The Plant estate was represented in that matter by Messrs. Stewart & Shearer, Attorneys, at 45 Wall Street, New York, and the Roebling estate was represented by Messrs. Noble, Morgan & Scammell, Attorneys, at 105 Broadway, New York.

THIRD. As further evidence that the Government conceded that question below and of the Government's policy in regard thereto, the attention of this Honorable Court is respectfully invited to the comments in the opinion (Rec. p. 151) which show that the Court below did not regard that question as being presented for decision:

"It is obvious that the United States had demanded and received a tax levied upon the estate of plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court.

Defendant now seeks to defeat a recovery of this illegally exacted tax by urging,

(1) That the court is without jurisdiction to entertain the suit since it was prematurely brought;

(2) That no claim for refund upon the grounds now relied upon was filed within four years from date of payment of the tax.

Other objections to plaintiff's suit were raised in the pleadings and in argument, but the above are the only defenses that merit consideration. A denial of substantial rights, based on purely technical grounds of a relatively insignificant character, is a result to be avoided if possible."

FOURTH. In view of the circumstances of the case as outlined above your petitioner did not deem it necessary to present to this Honorable Court in his printed brief, an extensive argument on a question which he considered already adjudicated, settled beyond dispute, and conceded by the Government; or, in other words, your petitioner believed that the admission of counsel for the Government made in open court at the trial below, the policy of the Government in regard to cases above referred to, and the failure of the Government to appeal from the decision in the case of *Merrill et al.* v. *United States, supra*, should be taken in good faith as conclusive of the issue that the Massachusetts inheritance tax was a proper deduction of Section 203 of the Revenue Act of September 8, 1916, as amended.

FIFTH. As further indication of the fact that your petitioner has not had a fair hearing the attention of the Honorable Court is invited to the fact that, at the original hearing, counsel for the Government consumed one hour and forty minutes of the two hours which had been allotted to this case, the result being that counsel for your petitioner did not begin his oral argument until about twenty minutes before one o'clock, and while he might have requested further time he did not do so because he felt that such a request would have been an imposition upon the indulgence of the Court, since most of the preceding tax cases had far overrun the time allotted to them, other cases had been allotted the entire afternoon session, and the Porto Rican cases were definitely set for the following day.

II.

If this petition should be allowed your petitioner is firmly convinced that he can show to the full satisfaction of this Honorable Court the following:

FIRST. The opinion of this Honorable Court inflicts a distinct hardship upon your petitioner and results in a wrongful and unjust discrimination against the estate which he represents as compared with other estates similarly situated, not only in the Commonwealth of Massachusetts but in various other states.

SECOND. The opinion of this Honorable Court is against the great weight of authority on the question of whether or not the Massachusetts inheritance tax was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as well as inconsistent with the established policy of the department in regard to that question.

THIRD. This Honorable Court in this case seems to have reversed the judgment of the District Court solely on a question which was not presented for the decision of that Court, contrary to the rule that an appellate court will consider only such questions as have been presented for the decision of the lower court, authorities and cases on this point being too numerous to mention (see cases cited at 3 C. J. 689 *et seq.*), among which are the following:

In "*Court Procedure in Federal Tax Cases*", Bickford, at pages 34–35, cites numerous cases and says:

> "NECESSITY FOR PRESENTING QUESTIONS.—It is a universal rule, with few exceptions, that the courts of review will consider only those questions which have been presented to and ruled upon by the lower court. The reasons for this rule are many. Primarily, the rule is based on the fact that many defects, if objected to during the trial, might be corrected by amending the pleadings or by introducing additional testimony, while, if such questions were allowed to be raised for the first time on appeal, the opposing party would

be deprived of his just right successfully to cure the defects. Another reason for the rule, which has been assigned in many cases, is that the appellate courts are established for the purpose of correcting errors which have been committed by the lower court. It is manifest that if questions have not been presented to the lower court for its decision it could have made no error in connection therewith. . . .

MATTERS OF DEFENSE OR OPPOSITION.—The rule that no question will be considered which was not raised in the court below will apply in all cases where the defendant fails to raise any matter of defense, either by pleading, by the introduction of evidence, or by objection to the plaintiff's evidence, and he may not raise such defense for the first time on appeal. For example, it has been held to be improper to raise, for the first time on appeal, contentions that the consideration for a contract was insufficient; that the act of a corporation was ultra vires; that any instrument was invalid; that the issues had previously been determined under the doctrine of res adjudicata; that a statute was unconstitutional; or that the statute of limitations had outlawed a claim.

ADHERENCE TO THEORY BELOW.—Perhaps the most important result of this general doctrine is the well recognized rule that the parties, on appeal, must adhere to the theory on which the case was prosecuted or defended in the lower court."

In the case of *City of New Orleans* v. *Howard*, 160 Fed. 393, the Circuit Court of Appeals for the Fifth Circuit said:

"The third and fourth assignments question the jurisdiction of the court in the case of Moore *v.* New Orleans Waterworks Co., but a discussion of this assignment may the passed sub silentio, as the issue presented cannot be raised in a collateral proceeding, and the record does not disclose that this question was presented for consideration of the trial court.

The fifth assignment presents for review the action of the court in decreeing the sale of the property in bulk. This assignment cannot be considered for the reason that appellant reserved no exception to the master's report advising such sale, but upon the contrary the record discloses that appellant acquiesced therein, and said, in answer to the rule, 'Respondent has no objections to urge against the confirmation of the report.' The proposition contained in this assignment should be treated without avolation."

In the case of *San Juan Light & T. Co.* v. *Requena*, 224 U. S. 89, Mr. Justice Van Devanter said:

"Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

FOURTH. The decision of this Honorable Court in the case of *Old Colony Trust Co. et al.* v. *Malley, Collector*, 19 Fed. (2) 345, should not in all justice and fairness to your petitioner be considered as conclusive in the instant case because (1) the specific issue here involved was not presented for decision in the Old Colony case and the application of the decision in that case to the case at bar is contrary to the rule as laid down by the Supreme Court when the Government advanced the same sort of contention in the case of *United States* v. *Mitchell*, 271 United States 9; 46 S. Ct. 418, in which Mr. Justice Butler, who delivered the opinion, said:

"Appellees contend that United States *v.* Woodward, supra, governs this case. The provisions of the Revenue Act of 1916 and of the Revenue Act of 1918 which are here involved were considered in that case. . . . The question considered and decided was whether in ascertaining net taxable income the estate tax was deductible. . . .

The question decided concerned the character of the exac-

tion; that is, whether the so-called federal 'estate taxes' were 'taxes' within the meaning of that word as used in the clause of section 214 quoted. The government did not contend that, if deductible at all, the estate taxes could not be deducted in that case because the return was made on the basis of income actually received in 1918, whereas the estate tax, accruing in that year, was not paid until 1919. That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. Webster v. Fall, 45 S. Ct. 148, 266 U. S. 507, 511, 69 L. Ed. 411."

And because (2) this Court in its opinion in the Old Colony case cited with approval and followed the decision of the Court of Claims in the case of *Irving Bank-Columbia Trust Co.* v. *United States*, 62 Ct. Cls. 564, involving the deduction of the Federal estate tax, while in its opinion in the instant case it completely disregards an equally cogent opinion of the Court of Claims in the case of *Merrill et al.* v. *United States*, 66 Ct. Cls. 136, involving the deduction of the Massachusetts inheritance tax, which was acquiesced in by the Government.

FIFTH. The retrospective effect which this Honorabte Court has given to the language used by the Congressional Committee in regard to Section 403 of the Revenue Act of 1918, which took the place of Section 203 of the Revenue Act of 1916, is the only instance in which any Court has adopted such a construction and is directly contrary to the effect which has been given to that same language (1) by the United States Supreme Court, (2) by the Circuit Court of Appeals of the Third Circuit, (3) by the Circuit Court of Appeals for the Fourth Circuit, (4) by the United States Court of Claims, (5) by the Federal District Courts of Pennsylvania, Utah and Maryland, and (6) by the District Court of Massachusetts in two decisions, one by Judge Morton, and that

by Judge Brewster in the case at bar, as shown by the cases referred to above, in all of which it has been held that state inheritance taxes were a proper deduction under Section 203 of the Act of 1916 notwithstanding that language of the Congressional Committee in regard to Section 403 of the Act of 1918. The construction which the Supreme Court put upon that language is clearly expressed in the case of *United States* v. *Field*, 255 U. S. 257; S. Ct. 256, in which Mr. Justice Pitney, who delivered the opinion, said:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Section 402 (2), 40 Stat. 1097). . . .
>
> Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. See Matter of Miller, 110 N. Y. 216, 222, 18 N. E. 139; Matter of Harbeck, 161 N. Y. 211, 217, 218, 55 N. E. 850; United States *v.* Bashaw, 50 Fed. 749, 754, 1 C. C. A. 63. The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d Sess.). It is evident, however, that this statement was based upon the interpretation of the act of 1916 adopted by the Treasury Department. The same report proceeded to declare (page 102) that 'the absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax'; and this, together with the fact that the committee proposed that the law be amended

shows that the Treasury construction was not treated as a safe reliance."

SIXTH. The nature of the Massachusetts inheritance tax has not in fact been definitely settled by the cases of *Attorney General* v. *Stone*, 209 Mass. 196; *Boston Safe Dep. & Tr. Co.* v. *Com'r Corp. & Tax.*, 267 Mass. 240; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, because in those cases the "nature" of the Massachusetts inheritance tax was not the essential question presented for the decision of the Court, the controversies in all three cases having arisen over the question as to who, among conflicting beneficiaries of the estate, should be required to "pay the tax", and the comments in those opinions, which seem to be an interpretation of the statute itself, should be considered dictum as they were obviously used by the Court merely to explain its decision as to "who should be required to pay the tax".

SEVENTH. By the clear and express language used in Section 1, c. 65 of the General Laws of Massachusetts, the inheritance tax in its nature is a tax upon the "*transmission*" of the entire property of the estate and the specific legacies or contributive shares of the estate merely constitute the "*measure*" of the tax, just as under the Federal statute the tax is imposed upon the "*transfer*" of the net estate but is "*measured by*" respective blocks of $50,000, $100,000, etc., there being a long line of Massachusetts cases so holding, to wit:

Magee v. *Commissioner of Corp'ns & Tax.*, 256 Mass. 513;
Hollis v. *Treas. & Rec. Gen.*, 242 Mass. 163;
Pratt v. *Dean*, 246 Mass. 300;
Bingham v. *Com'r of Corp. & Tax.*, 249 Mass. 79.

In the case of *Hollis* v. *Treasurer & Receiver General*, *supra*, Chief Justice Rugg said:

"It is plain as a practical matter that the amount of money so paid for excise taxes never passes to anybody by succession from the deceased resident. Money so paid is a pecuniary burden laid for the support of government upon the

privilege of transmitting and receiving property by will or by intestate succession. A succession tax law ought not to be so interpreted as to exact an excise on the succession of that which in fact cannot pass to any beneficiary because seized by the State on its way from the dead to the living, unless the words of the statute leave no other alternative. Newcomb *v.* Paige, 224 Mass. 516. Such a tax, apart from its technical legal significance, would be in substance and effect a tax on a tax and not a tax on the succession of property. . . . By G. L. c. 65, § 1 (which does not differ in this respect from pre-existing statutes), 'All property within the jurisdiction of the Commonwealth . . . which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax.' . . . If the executor takes the property directly he must, in order to secure a transmissible title, invoke the laws of such taxing State and pay the tax. Bliss *v.* Bliss, 221 Mass. 201, 205. In either event the actual amount of property which he can transmit under the will must be depleted by the amount of the taxes so paid. . . . It was said in Callahan *v.* Woodbridge, 171 Mass. 595, at page 599, 'for the purpose of determining on what amount the tax is to be computed, expenses of administration must be deducted, as the tax is to be paid only on the amount which passes to the successor or successors.' In Hooper *v.* Shaw, 176 Mass. 190, at page 191, it was said by Chief Justice Holmes, 'Without throwing doubt upon the power of the State to adopt a harsher rule . . . we are of opinion that these words (of the statute) most naturally signify the property which the legatee would get were it not for the State tax imposed by the sentence in which the words occur.' The plain implication of both these utterances is that under the statute lawful excises paid in other jurisdictions must be deducted before the State excise is calculated."

In the case of *Pratt* v. *Dean, supra,* Mr. Chief Justice Rugg again described the nature of the Massachusetts inheritance tax in the following language:

"The main point to be decided in this connection, then, is whether, in ascertaining the property or interest passing, the trusts and the estate shall be treated as separate entities or grouped as one. The tax is imposed not upon the property but upon the right to receive property by reason of the death of the testator or donor. It is not a property tax but an excise upon the transmission of property. . . . The circumstance that the taxes may be payable by different persons, that is, by the trustees and by the executors, G. L. c. 65, § 6, or at different times, G. L. c. 65, § 7, is not material in this connection. The decisive factors established by the statute are the event by the happening of which the property passes and the time of the passing of the property. . . . The fact that the statute provides no rules for consolidating or apportioning the tax among different trusts and the estate is a matter of indifference in this connection. . . . The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor on his death, whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words."

In the case of *Bingham* v. *Com'r of Corp. & Tax.*, *supra*, the Supreme Judicial Court of Massachusetts said:

"There are numerous cases where the acquisition of title by the personal representatives of a deceased person is recognized as a distinct transfer of title. Laighton *v.* Brookline

Trust Co., 225 Mass. 458, 460. Said Chief Justice Shaw in Lawrence *v.* Wright, 23 Pick. 128, 129, 'The personal property of a deceased person vests in the executor or administrator; and when an administrator is appointed, the appointment relates back and vests the property in him from the decease of the intestate.' In Jewett *v.* Smith, 12 Mass. 309, questions arose touching the right of a sheriff to seize goods of a deceased debtor on an execution issued and delivered to the sheriff before the death but upon which the sheriff had taken no further action during the life of the debtor. It was said at page 310, 'The judgment debtor ceased to have any property in the chattels at his death. The property may be considered in abeyance until administration is granted, and is then vested in the administrator, by relation, from the time of the death.' It has been held that the estate of a decedent and the deceased person himself were separate for purposes of taxation. 'The decedent and his estate have long been regarded as separate taxable entities.' Bankers' Trust Co. *v.* Bowers, 295 Fed. Rep. 89, 94."

In the case of *Magee* v. *Commissioner of Corporations and Taxation, supra,* the Supreme Judicial Court of Massachusetts handed down the decision on June 29, 1926, which was the same day it rendered its opinion in the case of *Saltonstall* v. *Saltonstall,* 256 Mass. 519. In the Magee case the Court held that the Massachusetts tax was imposed both upon the "transmission" of property as well as upon the "privilege of succession".

In the Magee case the Court said:

"There are numerous adjudications where expressions have been used to the effect that the privilege of succession with all factors thereby imported, whether title, or possession and enjoyment, is in itself a commodity in its constitutional sense, susceptible of validly being made subject to an excise. In Attorney General *v.* Stone, 209 Mass. 186, at page 190, it was said: '*This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but*

also upon the privilege of his beneficiaries to succeed to the property thus dealt with. Minot *v.* Winthrop, 162 Mass. 113, 124. Crocker *v.* Shaw, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of Minot *v.* Treasurer & Receiver General, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted.'

There are numerous cases which show that the estate of a decedent is within the power of the State for taxation purposes until actual distribution to the persons entitled to receive it. See, for example, Welch v. *Boston, 211 Mass. 178."* (Italics ours.)

As to the decision of the Supreme Court, therefore, in the case of *Saltonstall* v. *Saltonstall*, 276 U. S. 260, it is quite evident that the Court did not have all of the foregoing decisions before it, for, as stated above, in that case the Court was not called upon to define or describe the "nature and incidence" of the Massachusetts inheritance tax but merely to decide whether or not all of the conflicting beneficiaries of the estate should under the Massachusetts statute be required to contribute their proportionate share "of the estate" to the payment of the entire inheritance tax levied thereon.

EIGHTH. The contention in regard to algebraic formula as advanced by the Government in the case of *Old Colony Trust Company et al.* v. *Malley, supra,* is a pure fiction conceived in the minds of the administrative officers of the Bureau of Internal Revenue which misled this Honorable Court in that case and which has no application whatever to the case at bar because any state inheritance tax can be deducted and a Federal tax easily

computed by the simplest processes of arithmetic, just as has been done in the cases of inheritance taxes of Pennsylvania, Maryland, Utah, New York, New Jersey, Connecticut and all of the other cases where the deduction has been allowed, and an actual demonstration of this fact is presented in the plaintiff's bill of particulars, Rec. page 17, which contains a proper computation of the Federal tax with the Massachusetts tax deducted.

NINTH. The fact that counsel for the Government so adroitly refrained from contending in the lower Court, as he did before this Honorable Court, that the Massachusetts inheritance tax was not a proper deduction under Section 203 of the Act of September 8, 1916, as amended, seems to reveal a willful subterfuge, which not only led your petitioner to believe that that question was not in controversy, and that it was unnecessary to present evidence, authorities and arguments, but which also misled this Court as to the Government's real policy on that question, as applied to all other estates, since the decision of the Court of Claims in the case of *Merrill et al.* v. *United States, supra.*

TENTH. Regardless of all the hair splitting distinctions and refinements which may be observed in the opinions of some of the decided cases, a tax levied and collected by a state as the result of death is "an administration expense", "a claim against the estate", or "a charge against the estate" of the decedent, and is universally "allowed by the laws of the jurisdiction whether within or without the United States, under which the estate is being administered", as provided in Section 203 of the Act of September 8, 1916, and it is just as true under that Act as it was under the War Revenue Act of 1898 (30 Stat. 488, § 29, § 30) in the interpretation of which Mr. Chief Justice White in the leading tax case of *Knowlton* v. *Moore*, 178 U. S. 41, said:

> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them —that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been

enacted, in the legislation of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that it is the power *to transmit, or the transmission* from the dead to the living, on which such taxes are more immediately rested."

ELEVENTH. It is of vital importance to the petitioner, as well as of great public interest, for this Honorable Court specifically to decide the following questions raised by the record of this case:

First. Whether or not the plaintiff's original claim for refund sufficiently complied with the statute, in that the suit is brought to recover estate taxes, in regard to which the statute lays upon the Commissioner the positive duty of determining the legal and correct tax and in that the claim, while specifying certain grounds and a certain amount, requested refund of "such further amount as is legally refundable"?

Second. Whether or not since the plaintiff, being before the court on a proper claim for the refund of illegally collected estate taxes, should be permitted to amend his original claim and assert in court an additional reason why that same tax was excessive, such additional reason being based upon a court decision rendered after the time for filing a new claim had expired, but while the suit was still pending?

Both of these questions were decided by the District Court in favor of the plaintiff-appellee, and the same principles are upheld by the Court of Claims in the case of *Swift & Co. (of West Va.)* v. *United States*, 67 Ct. Cls. 322, as well as in other recent cases, but the questions have never been definitely decided by any Circuit Court of Appeals or by the Supreme Court.

III.

Your petitioner earnestly believes that a rehearing on this case could not possibly result in any hardship to the defendant-appellant and that it would be entirely in accordance with the open-minded attitude of this Honorable Court, as well as that of the Supreme Court in granting rehearings upon sufficient showing by the aggrieved party or under circumstances where the fundamental equities of the case seem so to require.

Pitman Mfg. Co. v. *Pitman et al.*, No. 2453;
Gardner et al. v. *United States*, No. 2531;
Union Parlor Furniture Co. v. *Weiser et al.*, No. 2486;
Bradford Electric Light Co. v. *Clapper*, No. 2465;
United States v. *Boston Insurance Co.*, 269 U. S. 197.

In the first four cases cited above this Honorable Court, having granted rehearings, reconsidered its former opinion during the October term, 1930.

In the case of *United States* v. *Boston Insurance Company, supra*, the Supreme Court granted a rehearing and in the opinion reversing its own former decision Mr. Justice McReynolds said:

> "Upon a re-examination of the record it became plain that we misapprehended the opinion and ruling of the lower court, also that the reason advanced to support our conclusion is insufficient."

Having examined the petitions for rehearing and opinions in those cases and in view of the open minded attitude both of this Court and the Supreme Court in that respect your petitioner feels that he may with equal propriety request a rehearing in this case.

Therefore your petitioner prays that a rehearing may be granted together with such other and further relief as to this Honorable Court may seem to be just and proper.

ROBERT M. LEACH,
Executor of the Estate of WILLIAM E. WALKER;
by his Attorney,
O. WALKER TAYLOR.

CERTIFICATE.

I hereby certify that I have read the foregoing petition for rehearing, and that in my opinion it is well founded and presents grounds whereon rehearing ought to be granted, and I further certify that it is not intended for purposes of delay, and that all matters of fact therein represented and not appearing of record are true.

O. WALKER TAYLOR,
Attorney for Plaintiff-Appellee.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. JULY 6, 1931.

Then appeared the above-named O. Walker Taylor, and made oath that the foregoing certificate, signed by him, is true to the best of his knowledge and belief. Before me,

FRANK J. LINEHAN, Jr.,
Notary Public.

[SEAL]

On April 22, 1931, this cause came on to be heard by the court, Honorable George H. Bingham, Honorable George W. Anderson and Honorable Scott Wilson, Circuit Judges, sitting.

Thereafter, to wit, on June 10, 1931, the opinion of the court (page 163) was filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 10, 1931

This cause came on to be heard April 22, 1931, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel;

Upon consideration whereof, It is now, to wit, June 10, 1931, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed with costs.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on July 9, 1931, a petition for rehearing (page 175) was filed by the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—July 22, 1931

No judge who concurred in the judgment entered June 10, 1931, desiring a rehearing, It is ordered that the petition for rehearing filed July 9, 1931, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk

IN UNITED STATES CIRCUIT COURT OF APPEALS

PLAINTIFF-APPELLEE'S MOTION TO RECONSIDER PETITION FOR REHEARING—Filed August 7, 1931

Now comes Robert M. Leach, executor, the plaintiff-appellee in the above-entitled cause, and moves:

1. That the order denying the plaintiff-appellee's petition for rehearing, entered on July 22, 1931, be vacated.

2. That the Honorable Court reconsider said petition and grant a rehearing as therein prayed for; and,

3. That the mandate herein be stayed until further order of the court.

Robert M. Leach, Executor of the Estate of William E. Walker, by His Attorney, O. Walker Taylor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION FOR RECONSIDERATION—August 14, 1931

It is ordered that appellee's motion for reconsideration of the petition for rehearing be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on August 20, 1931, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,282. U. S. Circuit Court of Appeals, First Circuit. Term No. 468. Robert M. Leach, executor, etc., petitioner, vs. Malcolm E. Nichols, formerly Collector of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 19, 1931. File No. 36,282.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .

ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,
v.
MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

The petitioner, Robert M. Leach, as executor of the estate of William E. Walker, late resident of Taunton, Massachusetts, earnestly prays that a writ of certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Nichols* v. *Leach*, 50 Fed. (2) 787 (Rec. pp. 163–174), which reversed the decision in *Leach* v. *Nichols*, 42 Fed. (2) 918 (Rec. p. 147–157) wherein the District Court rendered judgment for the plaintiff, your petitioner, in the amount of $5,672.91, together with costs.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; U. S. Code, Title 28, Sec. 347.

The opinion of the Circuit Court of Appeals was rendered on June 10, 1931, but the appellee, petitioner herein, seasonably filed a petition for rehearing, which was denied by an order dated July 22, 1931 (Rec. p. 195). This petition was filed within three months of the date of the aforesaid order of denial, as

required by Section 8 of the Act of February 13, 1925, *supra* (U. S. Code, Title 28, Sec. 350).

Notice of the filing of this petition, together with a copy of the petition, printed record and supporting brief has been duly served by the petitioner upon counsel for the respondent and due proof of such service filed with the clerk, as required by Rule 38 of this Court.

Two questions are respectfully presented for the decision of this Court, as follows:

THE QUESTIONS PRESENTED.

First: As a matter of law:

Did the Circuit Court of Appeals err in holding that the tax imposed upon the estate by General Laws of Massachusetts, Chapter 65, was not a proper deduction, for the purpose of the Federal Estate Tax, as provided in Section 203 of the Revenue Act of September 8, 1916, as amended?

Second: As a matter of procedure:

Was the above question—the sole ground upon which the decision of the District Court was reversed—properly before the Circuit Court of Appeals in view of the fact that the appellant did not set forth that defense in his answer or in oral argument at the trial, but admitted, in open court, that other courts had already decided the question, so that the District Court considered that question as res adjudicata, did not rule thereon, and decided the case on two entirely different grounds?

With the controversy thus limited, the only statutes involved are as follows:

STATUTES INVOLVED.

1. General Laws of Massachusetts, Chapter 65:

"SUBJECTS AND RATES OF TAXATION.

"Section 1. *All property* within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, *which shall pass* by will, or by laws regu-

lating intestate succession, . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

"Section 6. *Administrators, executors* and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, *shall be liable for the taxes imposed by this chapter,* with interest, until the same have been paid.

"Section 7. *Taxes imposed by this chapter upon property* or interests therein, *passing by will* or by laws regulating intestate succession, *shall be payable to the state treasurer by the executors,* administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent, or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subject to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, *shall be charged with a lien for all taxes* and interest thereon which are or may become due on such property: . . ." (Italics ours.)

2. Revenue Act of September 8, 1916, as amended (39 Stat. 777, c. 463; Comp. Stat. (1918), Section 6336¼d):

"THE NET ESTATE."

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, *claims against the estate* . . . and *such other charges* against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and . . ." (Italics ours.)

The essential facts of the case, briefly stated, are as follows:

STATEMENT OF THE FACTS.

Under the Massachusetts statute, *supra*, the petitioner, as executor, was required to pay and did pay taxes in the amount of $34,158.59. The bill for the tax was addressed to him as such executor (Rec. pp. 142–144), the tax was paid by him out of the proceeds of the estate before its distribution, and the Probate Court allowed the item in the executor's final account.

At the time the Federal estate tax return was filed, as well as when this suit was originally brought, Treasury Decision No. 2524 expressly prohibited the deduction of any such State taxes under Section 203 of the Federal Act, *supra*. However, while this suit was still pending for decision in the District Court the Court of Claims decided the case of *Merrill et al.* v. *United States*, 68 Ct. Cl. 136, which held that the Massachusetts tax was such proper deduction. On the strength of the decision in the Merrill case, from which the Government took no appeal, and other decisions which had held that the Massachusetts tax, and such taxes of other states, were proper deductions under Section 203 of the Act, *supra*, the plaintiff, petitioner herein, amended his original declaration (Rec. pp. 12–16) and alleged, among other things, that in arriving at the amount of the Federal tax the estate was entitled, under Section 203, *supra*, to deduct the $34,158.59 which had been paid as above stated to the Commonwealth of Massachusetts.

The defendant's answer to the plaintiff's amended declaration (Rec. pp. 19–20) contains no allegation that, as a matter of law, the Massachusetts tax was not such proper deduction and when the case came on for trial on the amended pleadings Judge Brewster of the District Court, making special reference to the question of whether or not the defendant would contend that

the Massachusetts tax was not a proper deduction, asked, and counsel for the defendant replied (Rec. p. 177), as follows:

> "The COURT. Apart from technicalities, and getting at the justice of the thing, you have collected some taxes you ought not to have in view of the decisions of the Court in regard to deducting the collected State taxes?
>
> Mr. SABINE. There is no doubt that the Massachusetts Inheritance Tax has been held to be deductible from the gross estate."

Thereafter, throughout the entire proceedings in the District Court no further reference was made to the question of whether or not, as a matter of law, the Massachusetts tax was a proper deduction under Section 203 of the Act of 1916, nor is any reference made to that question in the defendant's requests for conclusions of law (Rec. pp. 62–64) which were submitted to the District Court at the conclusion of the oral argument. In view of these facts, the opinion of the District Court (Rec. p. 151) passes over the question of the Massachusetts tax and decides the case on two entirely different grounds, to wit:

> "It is obvious that the United States had demanded and received a tax levied upon the estate of plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court.
>
> Defendant now seeks to defeat a recovery of this illegally exacted tax by urging,
>
> (1) That the court is without jurisdiction to entertain the suit since it was prematurely brought;
>
> (2) That no claim for refund upon the grounds now relied upon was filed within four years from date of payment of the tax."

In marked departure from these two issues, which alone the District Court decided and ruled upon, the chief error assigned by the appellant (Rec. pp. 158, 160) and the main argument advanced on appeal, was that, as a matter of law, the Massachusetts tax was not a proper deduction under Section 203 of the Act. Likewise the Circuit Court of Appeals entirely disre-

garded the two issues decided by the District Court and said (Rec. p. 167):

> "However, it is unnecessary to determine whether a claim for refund can be amended by inserting entirely new grounds after the four year period of limitation has expired, as we think the District Court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case, as all other claims for refund in the amended declaration were properly disallowed."

Upon the law, the facts and the proceedings, the petitioner submits that the Circuit Court of Appeals erred in the following respects:

ASSIGNMENTS OF ERROR.

First: As a matter of Law:

The Circuit Court of Appeals erred in holding that the tax imposed by General Laws of Massachusetts, Chapter 65, which was paid by the executor from the proceeds of the estate before distribution and allowed in his account in the Probate Court, was not a proper deduction, for the purpose of the Federal estate tax, under Section 203 of the Revenue Act of September 8, 1916, as amended.

Second: As a matter of procedure:

The Circuit Court of Appeals erred in reversing the judgment of the District Court solely on a question which was not presented for decision or ruled upon by the District Court.

As reasons for the allowance of this petition the petitioner respectfully submits the following:

REASONS SUBMITTED FOR THE ALLOWANCE OF THIS PETITION.

First: The case presents important questions both of procedure and of statutory construction involving a Federal law and also a State law, which have not been, but which should be, as a matter of public concern, conclusively settled by this Court.

Second: The decision of the Circuit Court of Appeals is the only instance in which any court has ever held that the tax

imposed by General Laws of Massachusetts, Chapter 65, *supra*, was not a proper deduction under Section 203 of the Revenue Act of 1916, *supra*, and is directly in conflict with two decisions of the District Court of Massachusetts and a decision of the Court of Claims on that precise question, as well as with a long line of decisions of this Court and other courts involving the same underlying principles:

Keith v. *Johnson*, 44 S. Ct. 415; 271 U. S. 1;
United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;
Lederer v. *Northern Trust Company* (Third Circuit), 262 Fed. 52; certiorari denied, 40 S. Ct. 483; 253 U. S. 487;
Miles v. *Curley* (Fourth Circuit), 291 Fed. 761; certiorari not applied for.
Thayer v. *Malley* (Dist. of Mass., Morton, J.), 3 Fed. (2) 194;
Leach v. *Nichols* (Dist. of Mass., Brewster, J.), 42 Fed. (2) 918;
Merrill v. *United States*, 66 Ct. Cl. 136; certiorari not applied for.

Third: The Circuit Court of Appeals for the First Circuit, in reversing the judgment of the District Court in this case solely on a question which was not presented for decision or ruled upon by the District Court, has so far departed from the accepted and usual course of judicial procedure as to call for this Court's power of supervision.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
United States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9;
San Juan Light & T. Co. v. *Requena*, 224 U. S. 89;
Lesser Cotton Co. v. *St. Louis, I. M. & S. R. Y. Co.*, 114 Fed. 133, 142-143.

CONCLUSION.

WHEREFORE your petitioner, by his undersigned counsel, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and deter-

mination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled Malcolm E. Nichols, Former Collector of Internal Revenue, Defendant, Appellant, *v.* Robert M. Leach, Executor, Plaintiff, Appellee, being designated and numbered on its docket October Term 1930, No. 2554, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioner may have the relief herein prayed for, and such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

ROBERT M. LEACH, *Executor of the Estate of William E. Walker, by his Attorney,*
O. WALKER TAYLOR,
11 Beacon Street, Boston, Massachusetts.

CERTIFICATE.

I hereby certify that I am counsel for the petitioner herein, Robert M. Leach, executor of the estate of William E. Walker; that in accordance with the request of said petitioner the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief; and that said petition is in my opinion well founded in law and in fact and should be granted.

O. WALKER TAYLOR.

COMMONWEALTH OF MASSACHUSETTS.
COUNTY OF SUFFOLK, ss.

BOSTON, MASSACHUSETTS, October 19, 1931.

Then personally appeared O. Walker Taylor of Boston, Massachusetts, and made oath that he prepared and signed the foregoing petition and that the same is prepared with the consent

of and in accordance with the request of the petitioner named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

FRANK J. LINEHAN, Jr.,

[SEAL] *Notary Public.*

My commission expires October 22, 1937.

BRIEF IN SUPPORT OF PETITION.

STATEMENT.

The voluminous record in this case, your petitioner begs to explain, was brought about by the fact that the appellant, the respondent herein, insisted upon including in the record everything that had taken place in the course of the extended proceedings in the case, most of which is entirely irrelevant to the issues herein presented.

Your petitioner believes that the statement of facts embodied in the petition are entirely sufficient for this purpose.

In support of the allowance of the petition the following is respectfully submitted:

ARGUMENT.

I.

THE CASE PRESENTS IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION INVOLVING A FEDERAL LAW AND ALSO A STATE LAW AS WELL AS A QUESTION OF PROCEDURE, WHICH HAVE NOT BEEN, BUT WHICH, AS A MATTER OF PUBLIC CONCERN, SHOULD BE CONCLUSIVELY SETTLED BY THIS COURT.

In the case at bar it seems obvious that the specific issue of law presented must turn upon the "nature" of the tax imposed by the Massachusetts statute, *supra*. If the tax imposed under that statute is a tax upon the "receipt" of property, or, in other words, upon the "legacy" as a separate entity, then the tax would not seem to be a "claim" or "charge" against the estate under the Federal statute. On the other hand, if the Massachusetts tax is imposed upon the "transfer" of the property of the estate, as your petitioner contends that it is, then the Massachusetts tax would seem to be a proper deduction under Section 203, *supra*, of the Act. The decisions of the highest court of Massachusetts are in hopeless disagreement on the question of just what is the "nature" of the Massachusetts tax.

The Circuit Court of Appeals for the Fourth Circuit was con-

fronted with exactly the same situation in regard to the tax imposed upon estates by the statutes of Maryland, and in the case of *Miles* v. *Curley et al.*, 291 Fed. 761, which held that the Maryland tax *was* a proper deduction under Section 203, *supra*, that Court at page 763 of the opinion said:

> "The decision by the highest court of Maryland, directly deciding this question, and construing the statute imposing such collateral inheritence tax, would be binding upon this court. Is there any such decision?
>
> In discussing this question, the learned district judge, in his opinion overruling the demurrer to the declaration herein, says:
>
> > 'In the case at bar, each side has argued that the Court of Appeals of this State has interpreted the act in the sense for which it contends, and each quotes language which, if standing alone, might sustain its position. That each is able to do so is perhaps the best proof that the attention of that high court never had been drawn to the precise point now at issue, in such sense, at least, as to call for its definite determination.'"

The opinion of the Circuit Court of Appeals (Rec. p. 170) cites three of the Massachusetts cases in the opinions of which language is found which seems to indicate that in its nature the Massachusetts tax is imposed upon the "receipt" instead of the "transfer" of the property of the estate.

Attorney General v. *Stone*, 209 Mass. 186;
Boston Safe Deposit & Tr. Co. v. *Com'r. of Corp. & Tax.*, 267 Mass. 240;
Saltonstall v. *Saltonstall*, 276 U. S. 260.

However, there are numerous other Massachusetts decisions not referred to in that opinion which seem to hold that the Massachusetts tax is in its nature a tax upon the "transfer" and not upon the "receipt" of property.

Magee v. *Commissioner of Corp'ns & Tax.*, 256 Mass. 513;
Hollis v. *Treas. & Rec. Gen.*, 242 Mass. 163;
Pratt v. *Dean*, 246 Mass. 300;

Bingham v. *Com'r of Corp. & Tax.*, 249 Mass. 79.

As stated in the petition, the decision of the Circuit Court of Appeals in this case is the only instance in which any Court has held that the Massachusetts tax is imposed upon the "legacy", as a separate entity, and thus improperly deductible by the "estate" under the Federal statute. On the other hand, both Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley*, 3 Fed. (2) 194, and Judge Brewster, in the instant case, as well as the Court of Claims in the case of *Merrill et al.* v. *United States*, 66 Ct. Cl. 136, have held that the Massachusetts tax is in its nature a "transfer" tax and therefore properly deductible under the Federal statute. The Government did not apply for certiorari in the Merrill case. In that case Judge Moss of the Court of Claims commented upon two decisions of this Court and said:

> "The attention of the Court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the *Thayer* v. *Malley Case* on that point, but it should also be noted that the later case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in the *Eisner Case* on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the Court held that the inheritance tax was deductible, citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the Court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the *Thayer-Malley Case.*"

It is thus apparent that the Court of Claims in the *Merrill Case* seems to have been guided by the language used by this Court in the *Keith* v. *Johnson Case* in holding that a tax of this

character is imposed upon the "transfer" and not upon the receipt of property. On the other hand, the Circuit Court of Appeals for the First Circuit seems to have been guided by the language used by this Court in the *New York Trust Company* v. *Eisner Case* in holding that such taxes are imposed upon the "separate legacies as distinct entities" and not upon the "transfer" of the estate.

Aside from all consideration of the case at bar, your petitioner earnestly believes that a decision by this Honorable Court definitely settling the status of such State taxes will be of great public interest and usefulness. Such a decision would be of great value not only to the citizens of the Commonwealth of Massachusetts, but it would also be useful to the administrative officers of the Government, as well as to the general public, in connection with many questions constantly arising under the Federal statutes where the Massachusetts tax, and such taxes of other States, are involved.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN THIS CASE IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AS WELL AS WITH THOSE OF OTHER COURTS INVOLVING THE PRECISE ISSUES.

First: As to the decisions of this Court:

As pointed out by the Court of Claims in the decision of *Merrill et al.* v. *United States, supra*, the language of the Massachusetts statute is almost identical with that of the State of New York. As to the nature of the New York tax, Mr. Justice Butler, who delivered the opinion in the case of *Keith* v. *Johnson, supra,* said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased (section 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Sections 221, 221 (a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representa-

> tives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. Section 224. They are not entitled to discharge until the tax is paid. Section 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death, and the state's portion is deductible from the legacy and does not pass to the legatee."

Your petitioner respectfully submits that this language is directly applicable to the wording of the Massachusetts statute, *supra*, and that being the case the Massachusetts tax must be a proper deduction under Section 203, *supra*, of the Federal statute.

The opinion of the Circuit Court of Appeals is directly in conflict with still another decision of this Court. The opinion (Rec. pp. 172, 173) states:

> "However, this court in *Old Colony Trust Co.* v. *Malley*, 19 Fed. (2d) 346, held in principle, if not expressly, that Massachusetts succession taxes should not be deducted in arriving at the net estate of a decedent. It was determined in that case that the provision in Sec. 403 (a) (1) of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in Sec. 203 (a) (1) of the Act of 1916; that it was as the committee of Congress stated at the time the change was proposed, merely "intended for the sake of clarification."

But, in the case of *United States* v. *Field*, 41 S. Ct. 256; 255 U. S. 257 (see Rec. p. 85), Mr. Justice Pitney who delivered the opinion said that the language used by the committee in connection with Sections 402 and 403 of the Act of 1918, which took the place of Sections 203 and 204 of the Act of 1916,

should not be construed as merely "for the sake of clarification" of the earlier act, for, if that had been the intent of the legislation, "it would have been easy for Congress to express" such purpose as it did do in the later Act.

Second: As to the decisions of the Court of Claims and the District Court of Massachusetts:

As to the two decisions of the District Court on the precise question here involved and that of the Court of Claims in the case of *Merrill et al.* v. *United States, supra*, sufficient comment has already been given. Your petitioner respectfully submits, however, that since the Government did not apply for certiorari in the Merrill case and, as a matter of common knowledge, settled other cases involving the Massachusetts tax then pending in the Court of Claims, that decision should have been followed by the Circuit Court of Appeals in the instant case, otherwise the Federal taxing statutes are not equally and uniformly applied to different taxpayers in exactly the same position, which is in violation of the fundamental principles of the Constitution of the United States.

Third: As to the decisions of the Supreme Judicial Court of Massachusetts:

As stated above, the opinion of the Circuit Court of Appeals adheres to only one group of the conflicting decisions of the highest court of Massachusetts on the question of the nature of the Massachusetts tax. Four cases on this point have been cited above. It is not necessary to quote the language used in the opinions of these four cases and the other Massachusetts cases to the same effect. The language used in the opinion of *Hollis* v. *Treas. & Rec. Gen.*, 242 Mass. 163, is typical of this group of cases. In the opinion in that case Mr. Chief Justice Rugg in interpreting the Massachusetts statute said:

> "It is plain as a practical matter that the amount of money so paid for excise taxes never passes to anybody by succession from the deceased resident. Money so paid is a pecuniary burden laid for the support of government upon the privilege of transmitting and receiving property by will or by intestate succession. A succession tax law

> ought not to be so interpreted as to exact an excise on the succession of that which in fact cannot pass to any beneficiary because seized by the State on its way from the dead to the living, unless the words of the statute leave no other alternative. *Newcomb* v. *Paige*, 224 Mass. 516. Such a tax apart from its technical legal significance, would be in substance and effect a tax on a tax and not a tax on the succession of property. . . . By G. L. c. 65, § 1 (which does not differ in this respect from pre-existing statutes), 'All property within the jurisdiction of the Commonwealth . . . which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax.' . . . If the executor takes the property directly he must, in order to secure a transmissible title, invoke the laws of such taxing State and pay the tax. *Bliss* v. *Bliss*, 221 Mass. 201, 205. In either event the actual amount of property which he can transmit under the will must be depleted by the amount of the taxes so paid. . . ."

Fourth: As to the conflicting decisions of other Circuits:

As pointed out above, the decision of the Circuit Court of Appeals for the First Circuit in this case is directly in conflict with decisions of the Third and Fourth Circuits.

> *Lederer* v. *Northern Trust Company*, 262 Fed. 52; certiorari denied, 40 S. Ct. 483;
> *Miles* v. *Curley*, 291 Fed. 761; certiorari not applied for.

These two cases involve the question of the deductibility, under Section 203 of the Revenue Act of 1916, of the taxes imposed upon estates by the statutes of Pennsylvania and Maryland. The statutes of those States, your petitioner respectfully submits, are, in their essential respects, like the Massachusetts statutes. Under all of these statutes the taxes must be paid out of the property of the estate before its distribution, and the executor is liable for the payment of such taxes.

Your petitioner respectfully submits, therefore, that the decision of the Circuit Court of Appeals in this instance is in conflict with the great weight of authority on the issues involved, and that it results in an unjust discrimination against the estate

which your petitioner represents as compared with other estates, both in Massachusetts and elsewhere in exactly the same position, thus violating the fundamental principles of the Constitution of the United States.

III.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT SOLELY ON A QUESTION WHICH WAS NOT PRESENTED FOR DECISION OR RULED UPON BY THE DISTRICT COURT.

It is a universal rule, with few exceptions, that Courts of Review will consider only those questions which have been presented to and ruled upon by the lower Court, and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

In the case of *San Juan Light & T. Co.* v. *Requena*, 224 U. S. 89, Mr. Justice Van Devanter, who delivered the opinion of this Court, said:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Tucker* v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228, Mr. Justice Stone delivered the opinion of this Court and said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

In the case of *United States* v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9, Mr. Justice Butler, who delivered the opinion, said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been

decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 45 S. Ct. 148, 266 U. S. 507, 511, 69 L. Ed. 411."

In view of the facts of the instant case, as stated in the petition, your petitioner respectfully submits that the sole question upon which the Circuit Court of Appeals reversed the judgment of the District Court was not presented for decision or ruled upon by the District Court and that there is a clear variance between the question decided by the Circuit Court and the questions which were decided by the District Court.

CONCLUSION.

Your petitioner respectfully submits, therefore, that this Honorable Court should grant certiorari in this case.

Respectfully submitted,

O. WALTER TAYLOR,

Attorney for the Petitioner.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor,
Plaintiff, Defendant in Error, Petitioner,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue,
Defendant, Plaintiff in Error, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER IN REPLY.

O. WALKER TAYLOR,
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DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER IN REPLY.

STATEMENT.

Pursuant to leave granted by the Court, the petitioner in the above-entitled case respectfully submits the following in reply to the "Brief for the Respondent in Opposition" to the allowance of the petition for certiorari filed herein on October 19, 1931.

ARGUMENT.

I.

THE RESPONDENT'S QUESTION IN REGARD TO THE CLAIM FOR REFUND IS NOT PROPERLY RAISED BY WAY OF OPPOSITION TO THE ALLOWANCE OF THE PETITION FOR CERTIORARI.

On page 2 of the brief in opposition, the respondent contends "that the sole question which need be considered by the Honorable Court, is the following":

"Whether a District Court may consider a ground for

refund of federal estate taxes imposed under the Revenue Act of 1916 when the amended declaration upon which the plaintiff went to trial in that court made no averment that any claim for refund had been filed setting forth that ground, and, as a matter of fact, no such ground was asserted in any claim for refund until after the amended declaration was filed, and more than seven years after the payment of tax, when the taxpayer filed with the Collector what he designated an 'amendment to claim for refund'."

As to this contention of the respondent, your petitioner respectfully submits:

First: This is a petition to review a decision of the Circuit Court of Appeals for the First Circuit. It is not a petition to review a decision of the District Court. The mere fact that the respondent bases his objection upon the proceedings in the District Court shows on its face that the Circuit Court of Appeals reversed the decision of the District Court on a different ground from that upon which the District Court rendered its decision.

In the District Court, the respondent admitted, in open court, that "the Massachusetts tax was a proper deduction" (Rec. p. 177) and, as pointed out in the opinion of the District Court (Rec. p. 151), there sought "to defeat a recovery of this illegally exacted tax by urging:

(1) that the Court was without jurisdiction to entertain the suit . . ." and,

(2) that no claim for refund upon the grounds now relied upon was filed within four years from the date of payment of the (Federal estate) tax."

The District Court (Rec. pp. 147–157) held (1) that the Court did have jurisdiction, and (2) that the petitioner had sufficiently complied with the statute in regard to claims for refund (R. S. Secs. 3226 and 3228; 43 Stat. c. 234, pp. 342–343).

The Circuit Court of Appeals failed to consider either of the two questions considered and decided by the District Court, and in its opinion (Rec. p. 167) said it was "unnecessary" to determine the question in regard to the claim for refund as "the District Court erred in holding that the Massachusetts tax was deductible".

The petitioner respectfully submits that this *admitted variance* between the questions decided by the District Court and that decided by the Circuit Court of Appeals is one of the strongest and most substantial reasons why this Court should grant the petition for certiorari.

Second: Furthermore, since the Circuit Court of Appeals did not decide any of the questions in regard (1) to the petitioner's amended declaration, (2) or to the "amendment" to the original claim (Rec. p. 133–145), *which was filed while the suit was still pending for decision in the District Court*, your petitioner respectfully contends that the respondent should not be permitted to raise any such questions by way of opposition to the allowance of the petition for certiorari.

Third: Even if this case were before this Court for review on its merits, your petitioner respectfully submits that the question presented by the respondent, in regard to the sufficiency of the claim for refund, would be improperly raised and that, upon the authority of the decisions of this Court, the respondent would be limited to such questions and such issues as were decided by the Circuit Court of Appeals, and precluded from injecting into the case such questions as were not considered or decided by that Court. On this point decisions of this Court and other courts are too numerous to mention, among them are the following:

San Juan Light Tr. Co. v. *Requena*, 224 U. S. 89;
Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
United States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

In the case of *San Juan Light & Tr. Co.* v. *Requena, supra*, Mr. Justice Van Devanter said:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Tucker* v. *Alexander, supra*, Mr. Justice Stone said:

> "In our view of the case the question considered by

the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

In the case of *United States* v. *Mitchell, supra*, Mr. Justice Butler said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion of the Court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 45 S. Ct. 148, 266 U. S. 507, 511, 69 L. Ed. 411."

Your petitioner respectfully submits, therefore, that the question in regard to the claim for refund is not a proper ground for opposition to the allowance of the petition for certiorari.

II.

AS A MATTER OF FACT AND OF LAW THE PETITIONER FULLY COMPLIED WITH THE STATUTE AND THE REGULATIONS IN REGARD TO THE FILING OF PROPER CLAIM FOR REFUND.

While the petitioner contends that the respondent is precluded from injecting into the case all questions in regard to the filing of claim for refund, since the Circuit Court of Appeals did not decide that question, nevertheless it seems necessary to state that the petitioner strongly contends that the District Court did not err in holding that the statute and regulations in regard to the filing of claim for refund were fully complied with, both in fact and in law. A full recital of the facts on this question seems to be entirely unnecessary.

In sustaining the petitioner's contentions as to the sufficiency of the plaintiff's original claim for refund and the amendment thereto the District Court ruled and commented (Rec. pp. 154–155) as follows:

> "In the case at bar, the amount of the refund claimed in the first claim filed was the amount legally refundable,

and the amendment only operated to submit to the Commissioner formally what had already been informally presented at hearings on the re-opened original claim, namely, additional grounds for claiming a return of the amount legally refundable. There was evidence tending to show that it had been the policy of the Commissioner, in dealing with estates of deceased persons, to accept claims in more or less general terms and permit specifications to come later. It has been urged, and I think appropriately, that in a matter involving an estate tax, it would be peculiarly compatible with justice to give effect to such an amendment inasmuch as the statute lays upon the Commissioner the positive duty of assessing the correct tax and refunding any excess. To hold that a late amendment to a claim filed on time answers the statute, does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determination of the tax liability, and before suit is brought to recover any tax illegally collected."

The petitioner submits that the above comments of the District Court are sound both in law and in fact. The facts of the case show clearly that the Commissioner of Internal Revenue was not misled or deceived by reason of the fact that the *original claim for refund* (Plaintiffs' Exhibit 9; Rec. pp. 111–119) did not specify the deduction of the Massachusetts tax.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

As to the amendment to the claim for refund (Plaintiff's Exhibit 21; Rec. pp. 133–144), the petitioner contends that in this case such amendment was entirely proper. The original claim for refund was valid in every respect. The suit thereon was brought within the period of limitations. The original declaration alleged that such claim had been filed. The petitioner further contends that the amendment must have complied with the statute and regulations because the Commissioner of Internal Revenue, as a matter of fact, actually allowed one of the items which was asserted for the first time in the amendment to the claim. Of course he would not have allowed even this item if

the suit had not been pending, thus keeping open the question of the final determination of the tax. If the amendment to the claim, under these circumstances, was valid as to one item, it seems reasonable to assume that it should be regarded as valid as to any other item which was proper and legal.

The petitioner further contends that such an amendment is proper because under the rules of the Court a party to a suit is allowed to amend his declaration or any other pleading at any time before final judgment. The ruling and order of the District Court allowing the petitioner's amendment in the instant case is clearly sustained by *Paragraph 777, Title 28, of the Judicial Code*, which provides as follows:

> "777. DEFECTS OF FORM: AMENDMENTS.—No summons, writ declaration, return, process, judgment, or other proceedings in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specifically sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. Paragraph 954)."

Even if all of the "reasons" were not fully stated in the original claim for refund and in the original declaration, the cause of action remained unchanged and the petitioner contends that under the foregoing provisions he was clearly within his right in amending his original claim for refund showing further reasons why the *same tax* should be refunded, just as he was within his rights in appealing to the District Court to be allowed to amend his declaration. If this is not true the inevitable result is that the Commissioner of Internal Revenue can, by his regulation, completely nullify and set aside the rules of the Federal

Court and deprive taxpayers of the full benefit of the foregoing provision of the Judicial Code, in so far as amendments in actions at law are concerned.

Seaboard Air Line Railway v. *Renn*, 241 U. S. 290;
Texas & P. Ry. Co. v. *Cox*, 145 U. S. 593, 603;
Hutchinson v. *Otis Wilcox & Co.*, 190 U. S. 552.

In the case of *Seaboard Air Line Railway* v. *Renn*, *supra*, Mr. Justice Van Devanter laid down the following rule in regard to amendments:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. . . . In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit which was before the limitation had expired."

In the case at bar the amendment to the claim for refund as well as to the amendment to the declaration which was allowed by the District Court merely "expanded or amplified what was alleged in support of the cause of the action already asserted". The amendment to the claim for refund merely conformed to the amendment to the pleadings.

There is no statute, published regulation or reported case which prohibits the filing of an amendment to a valid and timely claim for refund of Federal estate taxes if a suit has been brought upon such claim within five years from the date the tax was paid and the final determination of the tax is held in abeyance pending the decision of the Court. If, therefore, the sufficiency of the claim for refund and the amendment thereto which were filed in the instant case have been, or may be, properly raised by the respondent, your petitioner respect-

fully submits that the real questions presented for the decision of this Court are as follows:

1. Was the broad and comprehensive language contained in the plaintiff's original claim for refund sufficient compliance with the statute, by reason of the fact that in the case of the estate tax the statute expressly imposes upon the Commissioner the duty, in the first instance, of determining the proper and legal amount of the tax and the claim for refund requested "such further amount as is legally refundable"?

2. Did the filing of a valid and timely claim for refund of a portion of the estate tax and the bringing of the suit thereon within five years from the date such tax was paid, *suspend* the running of the statute so that the plaintiff might rightfully amend his claim for refund to conform to the amended declaration as allowed by the District Court, in accordance with the rules of procedure of the Court.

Your petitioner respectfully submits, therefore, that the petition for certiorari in the instant case should not be denied because of the objection advanced by the respondent in regard to the matter of the claim for refund.

III.

THE CASE AT BAR IS CLEARLY DISTINGUISHABLE FROM THE CASE OF UNITED STATES v. FELT & TARRANT MANUFACTURING COMPANY, 283 U.S. 269.

On page 8 of the brief in opposition, the respondent states as follows:

> "Under the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Company*, 283 U. S. 269, it is plain that the petitioner is barred from recovering the tax he seeks to recover."

As to the *Felt & Tarrant Mfg. Company* case, the petitioner respectfully submits that that case is clearly distinguishable from the case at bar in the following respects:

(1) In that case the taxes involved were income taxes and the law did not impose upon the Commissioner of Internal Revenue the positive duty of determining and

establishing the true and legal amount of the tax in the first instance, so that the claim for refund which merely stated that it was "filed to protect all possible legal rights of the taxpayer" was clearly insufficient to comply with the requirements of the statute and the regulations.

(2) In that case, at no time during the proceedings before the Bureau of Internal Revenue was the ground for refund which was asserted in the suit ever brought to the attention of the Commissioner of Internal Revenue, so that he might pass thereon.

(3) In that case the tax was paid on June 15, 1918, but the suit was not brought until February 14, 1927, which was more than five years as provided by the statute.

(4) In that case no amendment to the original claim for refund specifying any grounds was ever filed with the Commissioner of Internal Revenue either before or after the suit had been brought.

Of all the recent tax cases decided by this Court, we think the case of *United States* v. *Swift & Company*, 51 S. Ct. 202, 282 U. S. 468, is more nearly in point. In that case the taxpayer filed an original claim for refund and later filed an amendment thereto. Mr. Justice Roberts who delivered the opinion in the *Swift case* held that the original claim was sufficient and in regard to the "amendment", said:

> "The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund."

If the respondents' question in regard to the sufficiency of the claim for refund has been properly raised, it is respectfully submitted that this Court should not deny the petition for certiorari on that ground but should allow the petition and decide the unsettled question as to whether or not a valid and timely claim for refund upon which suit has been seasonably brought may be amended while the suit is still pending and before the final determination of the tax.

Because of the fact that in the case at bar the plaintiff filed an amendment to the claim for refund, to conform to the amended declaration, while the suit was still pending and

before final determination of the tax, it is respectfully submitted that the petitioner is not "barred from recovering the tax he seeks to recover" by the decision of this Court in the case of *United States* v. *Felt & Tarrant Mfg. Co., supra.*

CONCLUSION.

Your petitioner respectfully submits that the contentions of the respondent as set forth in the brief in opposition should not be sustained and that this Court should grant the petition for certiorari in the instant case for the following reasons:

(1) Because of the great *conflict* of the decisions of the Supreme Judicial Court of Massachusetts as to the "nature" and "incidence" of the tax imposed upon estates by General Laws of Massachusetts, Chapter 65.

(2) Because of the *conflict* of the decisions of the District Court of Massachusetts and the United States Court of Claims on the one hand and the Circuit Court of Appeals on the other, as to whether or not the tax imposed upon estates by General Laws of Massachusetts, Chapter 65, was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as amended.

(3) Because of the *variance* between the ground upon which the Circuit Court of Appeals reversed the decision of the District Court and the grounds upon which the decision of the District Court is based.

(4) Because, if the decision of the District Court is reviewable, this case presents the question as to the effect of an amendment to a proper claim for refund filed after the suit thereon has been brought, *a question which does not seem to have been definitely decided by this Court. United States* v. *Swift & Company, supra.*

Respectfully submitted,

O. WALKER TAYLOR,
Attorney for Petitioner.

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BRIEF FOR THE PETITIONER.

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DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

BRIEF FOR THE PETITIONER.

THE NATURE OF THE PROCEEDING.

This is a review of a decision of the United States Circuit Court of Appeals for the First Circuit which reversed a judgment for $5,672.81, rendered in favor of the plaintiff, petitioner herein, by the United States District Court for the District of Massachusetts. The opinion of the Circuit Court of Appeals is reported as *Nichols, Collector,* v. *Leach, Executor,* in 50 Fed. (2) 787 (Rec. pp. 163–174), and that of the District Court, as *Leach, Executor,* v. *Nichols, Collector,* in 42 Fed. (2) 918 (Rec. pp. 147–157).

JURISDICTION.

The case is before this Honorable Court upon a writ of certiorari granted by an order entered herein on December 7, 1931. The petition for certiorari was filed on October 19, 1931, pursuant to the provisions of the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 938; U. S. Code, Title 28, Section 347).

STATEMENT OF THE CASE.

The suit is an action of contract brought to recover a portion of the "Federal Estate Tax", which the plaintiff originally alleged was wrongfully and erroneously assessed and collected from the estate of William E. Walker, late resident of Taunton, Massachusetts, of which the petitioner is executor, under the provisions of Title II of the Revenue Act of September 8, 1916, as amended (39 Stat. c. 463, pp. 777–780; Comp. Stat. 1916, § 6336½a–§ 6336½m), and the War Revenue Act of October 3, 1917 (40 Stat. c. 63, pp. 324–325; Comp. Stat. 1918, Comp't. Ed. § 6336½bbb).

The amount of the recovery originally sought was $49,634.74 together with interest. Since the suit was brought, however, $44,880.75 has been refunded and most of the issues originally involved have been settled or abandoned and are no longer in dispute.

The sole matter now in controversy is whether or not, upon the facts and the law of the case, the plaintiff, petitioner herein, was and is entitled to recover that portion of the "Federal Estate Tax", $3,692.44 with interest of $1,980.37, or a total of $5,672.81, which results from the refusal of the Commissioner of Internal Revenue, in making his determination of that tax to deduct under Section 203 (a) (1) of the Federal Act (Comp. Stat. 1918, § 6336½d), the State "transfer" or "succession" tax, amounting to $34,158.59, which the executor was required to pay and did pay (Rec. pp. 143–145) to the Commonwealth of Massachusetts under General Laws of Massachusetts, Chapter 65.

THE ISSUES DECIDED BY THE DISTRICT COURT.

The District Court, in its opinion, does not discuss or cite authorities on the question of the deductibility of the Massachusetts tax and treats that question as settled because the only defenses which the defendant, respondent herein, relied upon in the District Court were (1) that the Court was without jurisdiction since the suit had been prematurely brought and (2) that the plaintiff had not sufficiently complied with the statutes and regulations in regard to claims for refund (Rec. p. 180). Upon the issues raised under these two defenses, the District Court held and ruled as follows:

(1) That the "Court had jurisdiction of the subject matter and the parties" (Rec. p. 152);

(2) That the tax as determined by the Commissioner "is not the correct tax measured by the net estate in view of decisions of the courts;

(3) That "the claim for refund filed on June 20, 1925 (Rec. pp. 111–119) conformed to the statutes and regulations" (Rec. p. 153);

(4) That "the plaintiff should not be prejudiced by his failure to include in the original claim for refund a claim based on the refusal of the Commissioner to deduct the Massachusetts tax" (Rec. p. 155);

(5) That the "amendment" to the original claim (Rec. pp. 133–144) "only operated to submit to the Commissioner formally what had already been informally presented on the re-opened original claim" (Rec. p. 154);

(6) That "in a matter involving an estate tax it would be peculiarly compatible with justice to give effect to such an amendment in as much as the statute lays upon the Commissioner the positive duty of ascertaining the correct tax and refunding any excess" (Rec. p. 154); and

(7) That "the plaintiff is entitled to recover a judgment in this action but only to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts" (Rec. p. 156).

THE ISSUES ERRONEOUSLY DECIDED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals, the petitioner respectfully submits, erroneously reversed the judgment of the District Court on the sole ground that the Massachusetts tax was not, as a matter of law, properly deductible under Section 203 (a) (1) of the Act, and in its opinion erroneously held and ruled:

(1) That "it is unnecessary to determine" the questions in regard to claims for refund and amendments thereto which were decided by the District Court (Rec. p. 167);

(2) That "the District Court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case" (Rec. p. 167);

(3) That "the nature of the Massachusetts tax has been definitely settled by the decisions of the Massachusetts Courts and by this Court in the case of *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (Rec. p. 169);

(4) That the Massachusetts tax has not "become a charge upon the estate within the meaning of Section 203 (a) (1) of the Revenue Act of 1916", as amended (Rec. p. 169);

(5) That "amendments to a claim for refund may be allowed within the four year period and that the Commissioner may waive the provision of the regulations as to the form of a claim; but whether the four year period is a period of limitations as to any new grounds not included in the original claim *is not clear*" (Rec. p. 166).

(6) That the "provision in Section 403 of the Revenue Act of 1918, expressly prohibiting the deduction of estate and succession taxes, was merely declaratory of the intent of Congress in Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended (Rec. p. 172); and

(7) That the deduction of the Massachusetts tax would "render it necessary to resort to algebraic equations to determine" the amount of the Federal Estate tax (Rec. p. 172).

SPECIFICATION OF ERRORS.

The petitioner respectfully submits that the Circuit Court of Appeals erred in the following respects:

1. In reversing the judgment of the District Court on an entirely different ground from those upon which the District Court decided the case;

2. In holding and ruling that, as a matter of law, the Massachusetts tax was not a proper deduction under Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended;

3. In failing to decide the disputed issues in regard (1) to the jurisdiction of the District Court and (2) to the plaintiff's claim for refund and the amendment thereto.

Upon all the facts and the law of the case the petitioner respectfully submits the following questions for the decision of this Honorable Court:

THE QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

1. As a matter of procedure, was the question of the deductibility of the Massachusetts tax properly before the Circuit Court of Appeals?

2. As a matter of law, was the Massachusetts tax a proper deduction from the gross value of the estate under Section 203 (a) (1) of the Revenue Act of September 8, 1916, as amended?

3. Did the District Court have jurisdiction of the subject matter and of the parties at the time the suit was brought?

4. Did the plaintiff's "original claim for refund" and the "amendment" thereto, which was filed while the suit was still pending and conformed to the amended declaration, sufficiently comply with the requirements of Section 3226 of the Revised Statutes and the regulation established in pursuance thereof?

STATEMENT OF THE FACTS.

The essential facts of the case, for the purposes of this review, briefly stated, are as follows:

William E. Walker, the decedent, died a resident of Taunton, Massachusetts, on November 9, 1918. The petitioner herein duly qualified as executor of the estate (Rec. pp. 66–67) and on May 8, 1919, filed the required estate tax return (Rec. pp. 67–75) and paid the sum of $37,700.68, which was the total tax disclosed on the return. After notice and demand, additional sums were paid, $50,000 on February 21, 1922, and $2,034.96 on March 4, 1922, thus making a total of $89,735.64, all of which was paid to the respondent herein, who was then Collector of Internal Revenue at Boston.

The estate was also subject to the "transfer" or "succession" tax imposed by General Laws of Massachusetts, Chapter 65, and on November 10, 1919, the petitioner as executor paid to the Commonwealth of Massachusetts a tax in the amount of $34,158.59. The notice and demand for the Massachusetts tax was addressed to the petitioner as executor; the tax was paid by him out of the proceeds of the estate before its distribution and the Probate Court allowed the item as "an administration expense" in the executor's final account (Rec. pp. 142–144).

On June 20, 1925, the petitioner herein filed a claim and

requested refund of $49,634.74 "or such greater amount as is legally refundable" (Rec. pp. 111–119). The claim did not specifically refer to the refusal of the Commissioner to deduct the Massachusetts tax as one of the "reasons" why the tax as finally determined by the Commissioner was excessive, or erroneous. On November 16, 1925, the petitioner was advised orally that the claim had been rejected (Rec. p. 152). Written notice of the rejection was given by a letter dated January 16, 1926 (Rec. p. 120)

This action was begun by a writ dated December 1, 1925, and the amount alleged to be recoverable in the original declaration, which is not shown in the record, was $49,634.73. The case was heard on the original pleadings on November 17, 1926, before Honorable James A. Lowell, District Judge, with a jury, and the Court directed a verdict for the defendant. The plaintiff, petitioner herein, appealed and the Circuit Court of Appeals, in its previous opinion, rendered on December 27, 1927, and reported in 23 Fed. (2) 275 (Rec. pp. 5–11), reversed the judgment and remanded the case to the District Court for retrial (Rec. p. 1).

After the case had thus been remanded to the District Court the Commissioner of Internal Revenue re-opened and re-considered the "original claim for refund" (Rec. pp. 24–30), which he had previously rejected in its entirety, and on June 20, 1928, refunded to the petitioner, as executor, the sum of $43,863.37, together with interest, which represented that portion of the tax which had been paid upon certain property previously held, by the Commissioner, to have "been made by the decedent in contemplation of death" (Rec. p. 15).

On September 28, 1928, the petitioner filed a motion (Rec. p. 11) "to amend his declaration by substituting therefor the plaintiff's amended declaration" (Rec. pp. 12–18), which was allowed by the Court on October 28, 1928 (Rec. p. 12). The defendant, respondent herein, objected to the allowance of the motion on the ground that the amended declaration did not conform to the claim for refund upon which the suit was brought. The Court overruled the objection and expressly saved an exception but the defendant failed (1) to perfect an appeal upon the exception thus saved, (2) to file a motion to

dismiss, or, (3) to demur to the amended declaration, and (4) thereafter answered to the merits (Rec. pp. 19–20).

Before the case came on for retrial, the plaintiff, petitioner herein, filed an "Amendment to the Claim for Refund" (Rec. pp. 133–144) which did in every respect conform to the amended declaration. The Collector of Internal Revenue accepted the "Amendment to the Claim for Refund" without objection and officially stamped thereon the date of its receipt (Rec. p. 133). The Commissioner of Internal Revenue officially considered the document and on August 21, 1929, again redetermined the tax and allowed the plaintiff a further refund of $1,017.38, which was *one* of the items specified in the "Amendment", but refused to grant refund on account of any of the other items therein specified (Rec. pp. 150, 144–145).

On February 19, 1930, the case was heard on the amended pleadings before Honorable Elisha H. Brewster, District Judge, without jury, trial by jury having been waived by written stipulation. During the oral argument at the trial, reference was made to a recent decision of the United States Court of Claims (*Merrill et al.* v. *United States*, 66 Ct. Cls. 136) and to a previous decision of the District Court of Massachusetts (*Thayer* v. *Malley* (Morton J.) 3 Fed. (2) 194), both of which had expressly held that the Massachusetts tax was a proper deduction under Section 203 (a) (1) of the Act. Reference was also made to other decisions which had held that the same kind of "transfer" or "succession" taxes imposed by the States of New York, Pennsylvania, Maryland and Utah had been held to be properly deductible, and to the fact that the Government had acquiesced in all of those decisions. With these decisions in mind the District Court (Rec. p. 177) asked counsel for the defendant, respondent herein, the following question:

> "Apart from technicalities and getting at the justice of the thing, you have collected some tax you ought not to have, in view of the decisions of the Courts, in regard to deducting the collected State taxes?"

Counsel for the respondent replied as follows:

> "There is no doubt that the Massachusetts Inheritance tax has been held to be deductible from the gross estate."

On January 29, 1931, the District Court ordered judgment to be entered for the plaintiff in the amount of $3,692.44, damages, together with interest amounting to $1,980.37 and his costs (Rec. p. 34). On December 2, 1930, the defendant, respondent herein, filed his Substitute Bill of Exceptions (Rec. pp. 34–66) and filed his Petition for Appeal (Rec. p. 157) and Assignment of Errors (Rec. pp. 158–160) on January 29, 1931.

On April 22, 1931, the case was heard upon the transcript of the Record of the District Court before the United States Circuit Court of Appeals, which on June 10, 1931, ordered, adjudged and decreed that "the judgment of the District Court is reversed with costs" (Rec. p. 195).

On July 9, 1931, the appellee filed a petition for rehearing (Rec. pp. 175–194), which was denied by the Order of the Court on July 22, 1931 (Rec. p. 195). On August 7, 1931, the appellee, petitioner herein, filed a motion in the United States Circuit Court of Appeals to reconsider the petition for rehearing and on August 14, 1931, the Court denied the motion (Rec. p. 196).

On October 19, 1931, the petitioner filed his petition for certiorari, which was granted by an order of this Honorable Court entered on December 7, 1931 (Rec. pp. 196–197).

STATUTES INVOLVED.

In so far as the decision of the Circuit Court of Appeals is concerned the only statutes involved in the case are the following:

Revenue Act of 1916, effective September 8, 1916, as amended March 3, 1917 (Chap. 463, 39 Stat. 778).

Section 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of gross estate—

Revenue Act of 1918, effective February 24 1919 (Chap. 18, 40 Stat. 1060).

Section 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of gross estate—

(1) "Such amounts for funeral expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and *such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.*"

(1) "Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, *but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy or inheritances taxes.*"

. . . . . .

General Laws of Massachusetts, Chapter 65:

SUBJECTS AND RATES OF TAXATION.

"Section 1. *All property* within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, *which shall pass* by will, or by laws regulating intestate succession . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

"Section 6. *Administrators, executors* and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom benefi-

cial interests shall accrue by survivorship, *shall be liable for the taxes imposed by this chapter*, with interest, until the same have been paid.

"Section 7. *Taxes imposed by this chapter upon* property or interests therein, *passing by will* or by laws regulating interstate succession, *shall be payable to the state treasurer by the executors*, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustees, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled."

"If the probate court, acting under section thirteen of chapter one hundred and ninety-seven, has ordered the executor or administrator to retain funds to satisfy a claim of a creditor, the payment of the tax may be suspended by the court to await the disposition of such claim. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subjected to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, *shall be charged with a lien for all taxes and interest* thereon which are or may become due on such property. . . ." (Italics ours.)

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. . . ."

The various statutes and regulations upon which the decision of the District Court rests are presented and commented upon in the argument below.

ARGUMENT.

I.

THE QUESTION OF THE DEDUCTIBILITY OF THE MASSACHUSETTS TAX WAS NOT, AS A MATTER OF PROCEDURE, PROPERLY BEFORE THE CIRCUIT COURT OF APPEALS FOR ITS DECISION.

From the statement of facts presented above, it is clear that the respondent, as defendant in the District Court, did not contend that as a matter of law the Massachusetts Tax was not a proper deduction. As pointed out in the opinion of the District Court the only defenses relied upon were (1) that the Court was without jurisdiction and (2) that the petitioner as plaintiff had not sufficiently complied with the statutes and regulations in regard to the filing of the requisite claim for refund. In view of these facts, the petitioner respectfully submits that the Circuit Court of Appeals should have decided specifically the questions presented in the District Court.

It is a universal rule with few exceptions that Courts of Review will consider only those questions which have been presented and ruled upon by the Lower Court and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the Lower Court.

> *San Juan Light & Tr. Co.* v. *Requena*, 224 U. S. 89;
> *Tucker* v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
> *United States* v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

In the case of *Tucker* v. *Alexander, supra*, Mr. Justice Stone said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

II.

AS A MATTER OF LAW, THE TAX IMPOSED BY GENERAL LAWS OF MASSACHUSETTS, CHAPTER 65, WAS A PROPER DEDUCTION FROM THE GROSS VALUE OF THE ESTATE, UNDER SECTION 203 (a) (1) OF THE REVENUE ACT OF SEPTEMBER 8, 1916, AS AMENDED.

The Circuit Court of Appeals in its opinion holds that the tax imposed by the Massachusetts statute is a tax upon the "receipt" of property or in other words upon the "legacy" or the "succession" as a separate and distinct entity and that it is therefore a "claim" or "charge" not against the estate, but against each separate "legacy" or "succession". The petitioner respectfully submits the following:

First: By the Clear Language of the Statute the Massachusetts Tax is Imposed Upon the "Passing" or "Transfer" of the Property of the Estate.

The opinion of the Circuit Court of Appeals (Rec. p. 169) holds that the "nature of the Massachusetts tax has been definitely settled" by decisions of the Massachusetts Courts, "which construction was adopted" by a decision of this Court, and cites:

Attorney General v. *Stone*, 209 Mass. 186;
Boston Safe Dept. & Tr. Co. v. *Com'r of Corp. & Tax.*, 267 Mass. 240;
Saltonstall v. *Saltonstall*, 276 U. S. 260.

However, a careful study of the Massachusetts decisions will show that they are in great conflict as to the "nature of the Massachusetts tax" and that there are numerous other Massachusetts decisions, not cited in the opinion, which clearly hold that the tax is imposed upon the "transmission" of the property by the decedent, as well as upon the "receipt" of the property by the legatee.

Magee v. *Commissioner of Corp'ns & Tax.*, 256 Mass. 513;
Hollis v. *Treas. & Rec. Gen.*, 242 Mass. 163;
Pratt v. *Dean*, 246 Mass. 300;
Bingham v. *Com'r of Corp. & Tax.*, 249 Mass. 79.

The Circuit Court of Appeals for the Fourth Circuit was confronted with exactly the same situation in regard to the conflicting constructions which the State Courts put upon the statute of Maryland, which is similar to the Massachusetts statute.

Miles v. *Curley et al.*, 291 Fed. 761.

In the above case the Court held that the Maryland tax was a proper deduction under Section 203 of the Act and in its opinion, at page 763, said:

> "In the case at bar, each side has argued that the Court of Appeals of this State has interpreted the act in the sense for which it contends, and each quotes language which, if standing alone, might sustain its position. That each is able to do so is perhaps the best proof that the attention of that high court never had been drawn to the precise point now at issue, in such sense, at least, as to call for its definite determination."

The Circuit Court of Appeals for the First Circuit considered only one group of the conflicting decisions of the Massachusetts Courts and completely disregarded the other decisions where the language used in the opinion holds exactly to the contrary.

In the case of *Hollis* v. *Treas. & Rec. Gen.*, 242 Mass. 163, the language used by Mr. Chief Justice Rugg is typical of a long line of Massachusetts decisions. In that case the Court said:

> "It is plain as a practical matter that the amount of money so paid for excise taxes never passes to anybody by sucession from the deceased resident. Money so paid is a pecuniary burden laid for the support of government upon the privilege of transmitting and receiving property by will or by intestate succession. A succession tax law ought not to be so interpreted as to exact an excise on the succession of that which in fact cannot pass to any beneficiary because seized by the State on its way from the dead to the living, unless the words of the statute leave no other alternative. *Newcomb* v. *Paige*, 224 Mass. 516. Such a tax apart from its technical legal significance would be in substance and effect a tax on a tax and not a tax on

> the succession of property. . . . By G. L. c. 65, § 1 (which does not differ in this respect from pre-existing statutes), 'All property within the jurisdiction of the Commonwealth . . . which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax.' . . . If the executor takes the property directly he must, in order to secure a transmissible title, invoke the laws of such taxing State and pay the tax. *Bliss* v. *Bliss*, 221 Mass. 201, 205. In either event the actual amount of property which he can transmit under the will must be depleted by the amount of the taxes so paid. . . ."

As further proof that the "nature of the Massachusetts tax has not been settled" by the three cases referred to in the opinion of the Circuit Court of Appeals, the attention of this Court is respectfully invited to the language of the opinion in the case of *Saltonstall* v. *Treas. & Rec. Gen'l*, 256 Mass. 519, which came to this Court upon a writ of error and is reported as *Saltonstall et al.* v. *Saltonstall et al.*, 276 U. S. 260. In that case, 256 at page 523, Mr. Chief Justice Rugg said:

> "In *Attorney General* v. *Stone*, 209 Mass. 186, at 190 occur these words: '*This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with.* *Minot* v. *Winthrop*, 162 Mass. 113, 124; *Crocker* v. *Shaw*, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted." (Italics ours.)

Two other cases the respondent refers to in this connection

are also clearly distinguishable from the case at bar and equally impertinent to the issues here involved:

Boston Safe Dep. & Tr. Co. v. *Com'r. of Corp. & Tax.*, 267 Mass. 240;

Coolidge et al. v. *Long, Com'r of Corp. & Tax.*, 51 S. Ct. 306.

In both of the above cases the essential question was whether or not the Commonwealth of Massachusetts under its statute could subject to taxation property involved in trusts which had been created many years before the decedent's death. The fact that the Courts in those cases said that the interests of the respective beneficiaries under the trusts could properly and constitutionally be reached and taxed under the Massachusetts statute does not mean that the Courts construed the statute to mean that the tax was imposed upon each such interest as a separate and distinct "taxable entity".

In the case of *Pratt* v. *Dean*, 246 Mass. 300, at 309, Mr. Chief Justice Rugg in interpreting the Massachusetts Statute said:

> "The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor on his death, whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words.
>
> This conclusion is reached by interpretation of the tax statute and with full realization of the general principle that tax laws are to be strictly construed, that the right to tax is not to be extended by implication, and that doubts are to be resolved in favor of the taxpayer. *Eaton Crane & Pike Co.* v. *Commonwealth*, 237 Mass. 523, 530."

Regardless of the nature of the Massachusetts tax, it must be paid out of the property of the estate. If the will of the decedent makes no specific provision for the payment of the tax, the executor turns over the legacies and distributive shares free and clear and pays the tax out of the residue of the estate. If the will provides that the tax shall be deducted from each legacy or distributive share, the tax is still a "charge" upon the estate because the legacies themselves are a part of the estate. It is thus apparent that even if the Massachusetts statute did not say in plain words that "all property which shall pass . . . shall be subject to the tax", nevertheless, in its final analysis, the "incidence" of the tax is the "transmission of the property".

Knowlton v. *Moore*, 20 S. Ct. 747; 178 U. S. 41.

In the able and exhaustive opinion, in the above case, Mr. Chief Justice White said:

> "Thus looking over the whole field, and considering death duties in the order in which we have reviewed them . . . that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted in the legislation of the United States and the several states of the Union, . . . the following appears: Although different modes of assessing such duties prevail and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

The petitioner respectfully submits that these words of Mr. Chief Justice White are timely and pertinent, notwithstanding the fact that this Court has held that the tax imposed upon

estates by the State of New York was a tax "on the right of the individual beneficiaries".

New York Trust Co. v. *Eisner*, 41 S. Ct. 506; 256 U. S. 345.

Second: The Nature of the Massachusetts Tax is Not Decisive of the Specific Issue here Involved.

The petitioner respectfully submits that even if the Massachusetts Statute should be construed as imposing the tax upon the "legacy" or the right of the beneficiaries to receive the property, nevertheless, the tax in the instant case is deductible under Section 203 (a) (1) of the Act. The nature of the Massachusetts tax is immaterial. The controlling factors of the case at bar are:

1. That Section 6 of the Massachusetts Statute says that "executors shall be liable for the taxes imposed by this chapter";
2. That Section 7 says that the taxes imposed by this chapter upon property passing by will shall be payable to the State Treasurer by the executors;
3. That in the instant case the notice and demand for the taxes was served upon the executor by the Massachusetts tax officials (Rec. pp. 142–144);
4. That the tax was actually paid by the executor out of the property of the estate before its distribution; and
5. That the payment of the tax is under the Massachusetts Statute an allowable item in an executor's account and was actually allowed in the instant case by the Probate Court under the jurisdiction of which the estate was administered.

Thus, whatever the nature of the Massachusetts tax may be, it was obviously and clearly "such a charge against the estate as was allowed by the laws of the jurisdiction" under which the estate was administered as is provided in Section 203 (a) (1) of the Federal Statute.

Third: On the Great Weight of Authority of Federal Court Decisions the Massachusetts Tax was a Proper Deduction.

The decision of the Circuit Court of Appeals in the case at bar is the only instance in which any court has held that the Massachusetts tax was not a proper deduction under Section 203 (a) (1) of the Act. It not only reverses the decision of the District Court in the case at bar, but is contrary to a previous decision of the District Court of Massachusetts, which the Government did not appeal, and a decision of the Court of Claims in which certiorari was not applied for. It is also in conflict with the decisions of other circuits and of this Court involving the question of the deductibility of taxes of other states which, in all of their essential respects, are similar to the Massachusetts tax.

Merrill v. *United States*, 66 Ct. Cl. 136; certiorari not applied for;

Thayer v. *Malley* (Dist. of Mass., Morton, J.), 3 Fed. (2) 194; no appeal taken;

Kearns v. *Dunbar*, 292 Fed. 1013 (D. C. Utah), no appeal taken;

Kombst et al. v. *United States*, Ct. Cls. (unreported, dec. Nov. 2, 1931);

Lederer v. *Northern Trust Company* (Third Circuit), 262 Fed. 52; certiorari denied, 40 S. Ct. 483; 253 U. S. 487;

Miles v. *Curley* (Fourth Circuit), 291 Fed. 761; certiorari not applied for;

Edwards v. *Slocum*, 44 S. Ct. 293; 264 U. S. 61;

United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;

Keith v. *Johnson*, 44 S. Ct. 415; 271 U. S. 1.

In the case of *Merrill et al.* v. *United States, supra*, Judge Moss of the Court of Claims said:

> "The attention of the Court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the *Thayer* v. *Malley Case* on that point, but it should also be noted that the latter case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in

the Eisner Case on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the court held that the inheritance tax was deductible citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the Thayer Malley Case."

"Section 703 (a) (4) of the recent Revenue Act of 1928 provides that:

> 'In determining the net income of an heir devisee, legatee, distributee, or beneficiary . . . or of an estate, for any taxable year, under the Revenue Act of 1926, or any prior Revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction. . . .'

While this act deals explicitly with the question of the deductibility of the classes of tax named therein for federal income tax purposes, the government has seemed to recognize that where an inheritance tax is deductible from the gross income of the estate for income tax purposes, it is also a proper deduction from the value of the gross estate for estate tax purposes. However that may be, the court has reached the conclusion, upon a full consideration of the case, that the inheritance tax paid by the administrators herein to the commonwealth of Massachusetts was a charge against the estate within the meaning of the taxing statute, and should have been deducted from the value of the gross estate. Plaintiffs are entitled to judgment, and it is so adjudged and ordered."

In this connection we beg particularly to call to the attention of this Honorable Court the situation referred to by

Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley, supra*, where he said:

> "It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz., that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d."

In the case of *Keith* v. *Johnson, supra*, which involved the New York tax, Mr. Justice Butler, who delivered the opinion of the Court, said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased (section 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Section 221, 221 (a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. Section 224. They are not entitled to discharge until the tax is paid. Section 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death, and the state's portion is deductible from the legacy and does not pass to the legatee."

It is unnecessary to quote from the opinions of all of the cases cited above. It is sufficient to state that after the Government failed to apply for certiorari in the Merrill case, as the Records of the Court of Claims will show, it was the established policy of the Commissioner of Internal Revenue to allow the deduction of the Massachusetts Tax and such taxes of other States under Section 203 (a) (1) of the Revenue Act of September 8, 1916. In view of this fact and of the language used by Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley*, it is respectfully submitted that the opinion of the Court of Appeals in this instance is extremely unjust and operates as a discrimination upon the estate here involved.

Fourth: Section 203 (a) (1) of the Act of September 8, 1916, as amended, should not be construed as having the same effect as Section 403 (a) (1) of the Revenue Act of 1918.

By reference to the two sections it will be seen that Section 203 (a) (1) of the Act of 1916, as amended, provides in effect that all "charges" against the estate shall be deducted. Section 403 (a) (1) of the Act of 1918 expressly says that such charges shall not include any estate, succession or inheritance taxes. The opinion of the Circuit Court of Appeals (Rec. pp. 172–173) states that the Court in another case has determined:

> "That the provision in Sec. 403 (a) (1) of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in Sec. 203 (a) (1) of the Act of 1916; that it was, as the committee of Congress stated at the time the change was proposed, merely 'intended for the sake of clarification' ".

The statement of the Committee of Congress thus referred to is found in—

Senate Reports, Vol. No. 1, 65th Congress, 3d Session, 1918–1919:

At page 42 of the report, the Committee states:

> "Section 403, which takes the place of Section 203 of the original act defining the deductions for the purpose of arriving at the net estate, inserts a provision that income taxes upon income received after the death of the deced-

ent, and estate, succession, legacy or inheritance taxes, are not to be deducted. . . . These provisions are in conformity with existing rulings in the administration of the law, which rulings the Committee thinks are in accord with the statute, and are now included for the sake of clarification, as in the case of additions made to Section 402 mentioned above."

Section 402 of the Act of 1918 thus referred to by the Senate Committee expressly provided (1) that trusts and (2) powers of appointment, created before the passage of the Act, should be included in the gross estate. Section 202 of the Act of 1916 did not contain such express provisions, but the Treasury Department under its regulations, as the Committee states, interpreted Sections 202 and 203 of the Act of 1916 to mean exactly the same as Sections 402 and 403, respectively, of the Act of 1918.

The retrospective interpretation of Section 403 of the Act of 1918, which the Circuit Court of Appeals, in the case at bar, has applied to Section 203 of the Act of 1916, is directly in conflict with the interpretation put upon Section 403 by (1) the Circuit Court of Appeals for the Third Circuit, which held that the Pennsylvania tax was deductible, (2) the Circuit Court of Appeals for the Fourth Circuit, which held that the Maryland transfer tax was deductible, and (3) the United States Court of Claims, which held that the Massachusetts transfer tax was deductible, under Section 203 of the earlier Act. Such retrospective interpretation is also in direct conflict with the interpretation which this Honorable Court has, in two instances, put upon Section 402 of the Act of 1918 as applied to Section 202 of the Act of 1916.

Lederer v. *Northern Trust Company*, 262 Fed. 52, 54; certiorari denied, 40 S. Ct. 483;
Merrill et al. v. *United States*, 66 Ct. Cls. 136;
Miles v. *Curley*, 291 Fed. 761;
United States v. *Field*, 41 S. Ct. 256; 255 U. S. 257;
Shwab v. *Doyle*, 258 U. S. 529, 536.

In *Lederer* v. *Northern Trust Company*, *supra*, which held that the Pennsylvania tax was deductible under Section 203 of

the 1916 Act, Judge Wooley of the Third Circuit, referring to Section 403 of the 1918 Act, said:

> *"As this case arose before the Act of February 24, 1919* (30 Stat. 1057, c. 18) *by which the terms of the Act of September 8, 1916, were materially changed, this decision has no bearing on the later statute."* (Italics ours.)

In the case of *United States* v. *Field, supra,* Mr. Justice Pitney who delivered the opinion of the Court cited *Gould* v. *Gould,* 245 U. S. 151, 153; 35 S. Ct. 53, 62, and held that the accepted canon that the provisions of such acts are not to be extended by implication should apply and in the course of the opinion said:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (Section 402 (e) 40 Stat. 1097)."

In the case of *Shwab* v. *Doyle, supra,* where the Commissioner attempted to include in the gross estate a "transfer" made before the passage of the Act, Mr. Justice McKenna likewise held that Section 402 of the Act of 1918 should not be retroactively construed as applied to Section 202 of the Act of 1916, and in the course of the opinion said:

> "If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose, it did declare it. In the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, par 6336 3/4c) it re-enacted Section 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed, whether 'made or created before or after the passage of' the act. And we cannot accept the explanation that this was an elucidation of the act of 1916, and not an addition to it, as averred by defendant, but regard the act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But, granting the contention of the defendant

has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

It is respectfully submitted, therefore, that the Circuit Court of Appeals erred in holding that Section 203 of the Act of 1916 should be construed as having the same meaning as Section 403 of the Act of 1918 in regard to the deductibility of the Massachusetts tax under the earlier act.

Fifth: The deduction of the Massachusetts Tax would Not Require Algebraic Equations to Determine the Amount of the Federal Tax.

The opinion of the Circuit Court of Appeals (Rec. p. 172) says:

> "It should not be presumed that Congress intended that a tax Statute should be construed so as to render it necessary to resort to algebraic equations to determine a tax."

No argument is necessary to prove that the Circuit Court of Appeals erred in the above statement. The fact that the deduction of the Massachusetts tax would not render it necessary to resort to algebraic equations is clearly shown by the computation of the tax in the plaintiff's Bill of Particulars (Rec. p. 17) which was attached to the amended declaration. Furthermore, the Massachusetts tax can be deducted just as easily as the taxes imposed by the States of Pennsylvania, Maryland, Utah and California, in all of which cases the Courts have held that the States taxes were deductible, and the Commissioner of Internal Revenue has made the deduction in determining the amount of the Federal Estate tax, by the simple processes of arithmetic, just as any other deduction is made.

For all the reasons stated above, the petitioner respectfully submits to this Honorable Court that the Massachusetts tax was and is a proper deduction under Section 203 (a) (1) of the Act of September 8, 1916, as amended, and that the Circuit Court of Appeals erred in holding to the contrary.

III.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER AND OF THE PARTIES AT THE TIME THE SUIT WAS BROUGHT.

On this point, the District Court held (1) that the plaintiff had been advised of the rejection of his claim before the suit was brought and (2) that the defendant's answer to the merits and trial thereon " constitute waiver of any right now to set up the claim that suit was prematurely brought " (Rec. p. 152).

The petitioner respectfully submits that the District Court did not err in so holding for the following reason:

First: As to the Facts:

The claim for refund upon which the suit was originally brought was filed on June 20, 1925. The Commissioner of Internal Revenue granted a hearing on the claim which was held on November 16, 1925 (Rec. p. 37) and the conferees in the Bureau of Internal Revenue stated that the Bureau considered the case as closed as the claim had been rejected in its entirety. The official notice of the rejection was received on January 16, 1925 (Rec. pp. 120–121). The defendant failed to produce any evidence whatever at the trial to show that the Commissioner had not rendered a decision upon the claim for refund before December 1, 1925, or to show the exact date upon which the Commissioner did render his decision, and bases this technical jurisdictional objection solely on the fact that on January 16, 1926, the Commissioner notified the plaintiff of the rejection of the claim.

Second: As to the Law:

The statute upon which the defendant, respondent herein, relied in support of this technical objection is Section 3226 of the Revised Statute as amended (43 Stat. c. 234, p. 342), which provides:

> " No suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time. . . . The Commissioner shall within 90 days

after any such disallowance notify the taxpayer thereof by mail."

As to the law of the case the petitioner respectfully submits that the letter of January 16, 1926 (Rec. pp. 120–121), was nothing more or less than notice of the rejection of the claim which under the statute the Commissioner was required to give within 90 days after the rejection. It is thus clear that the actual rejection of the claim might have taken place any time within 90 days prior to the letter of January 16, 1926. The Commissioner renders a decision upon a claim for refund when he signs the "Schedule upon which the Claim is listed for Allowance or Rejection".

Girard Trust Co. v. *United States*, 46 S. Ct. 229; 270 U. S. 163;
United States v. *Boston Buick Company*, 51 S. Ct. 206; 282 U. S. 476.

Third: The Defendant Waived the Right to Object to the Jurisdiction.

As pointed out by the District Court in the opinion, this is not a case where the objection to the jurisdiction of the Court may be raised at any time. Where lack of jurisdiction is not *inherent* in the very nature of the case, the objection may be waived and is waived if the defendant answers to the merits and submits to the jurisdiction of the Court. It is a well-settled rule that if the defendant objects to the jurisdiction of the Court he is required to appear specially and raise the question by a motion asking "that the suit be dismissed" or "that the process of service be quashed, vacated or set aside".

Cyclopedia of Federal Procedure, Volume 3, Par. 755, 766–767;
Panama R. R. Co. v. *Johnson*, 289 Fed. 964; aff'd. 264 U. S. 375.

In the brief subsmitted to the Court below, the respondent herein referred to the above case and quoted from the opinion as follows:

"Where a court has no jurisdiction of the subject matter,

it cannot be conferred by consent of the parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection *in limine*, or at any particular stage of the proceedings. The want of such jurisdiction may be raised even on appeal."

In that same opinion, however, Mr. Justice Van Devanter, who delivered the opinion of the Court, said:

"The fundamental question, therefore, is: Did the District Court have jurisdiction of the subject matter? Section 24 of the Judicial Code (Comp. St. No. 991), so far as it is material to the question under consideration . . . gives the District Courts original jurisdiction of all suits of a civil nature at common law or in equity arising under the constitution or laws of the United States."

"In *Leon* v. *United States Shipping Board*, 286 Fed. 681, Judge Mayer, sitting in the Southern District of New York, held that under the Jones Act the action had to be brought in the district where the employer resides or has his principal place of business. But the defendant in that case appeared specially and moved that the action be dismissed on the ground of lack of jurisdiction. In other words the defendant in that case elected to insist upon its privilege and did not consent to waive it by appearing generally and failing to object. That case is plainly distinguishable from the case now before the court." . . .

"We think that the District Court for the Eastern District of New York had jurisdiction of this action, although it was not brought in the district in which the defendant resides or in which its principal office is located; the defendant having waived its privilege of requiring the suit to be brought in the district of its residence by not having appeared specially and objected to the jurisdiction. We see no reason, therefore, why the opinion of this court previously rendered, affirming the judgment below, should be set aside."

The plaintiff respectfully submits that the District Court did not err in holding that the Court had jurisdiction of the subject

matter and of the parties on December 1, 1925, the date of the writ.

IV.

THE PLAINTIFF'S ORIGINAL CLAIM FOR REFUND AND THE AMENDMENT THERETO WHICH WAS FILED WHILE THE SUIT WAS PENDING AND CONFORMED TO THE AMENDED DECLARATION SUFFICIENTLY COMPLIED WITH THE STATUTE AND REGULATIONS.

The "Brief for the Respondent in Opposition" to the allowance of the Petition for Certiorari states (p. 2), that this is the sole question which need be considered by this Honorable Court. As to the contention of the respondent and upon the facts and the law of the case in this regard the petitioner respectfully submits the following:

First: The Claim for Refund upon which the Suit was Originally Brought Was Sufficiently Broad in its Terms to Entitle the Petitioner to Recover.

The attention of this Honorable Court is invited to the broad language used in the original claim for refund (Rec. p. 112). The claim requests the refund of the amount therein specified "or such greater amount as is legally refundable".

It is respectfully submitted that this language is of vital importance in the case at bar because in the matter of the Federal Estate Tax the Statute expressly requires the Commissioner of Internal Revenue to determine and assess the correct amount of the tax, in the first instance, and also imposes a lien for ten years, for the payment of the tax, upon the property of the estate. The pertinent sections of the Act are as follows:

Section 205 (Comp. Stat. 1916, § 6336¼f).

"NOTICE AND RETURN."

"Sec. 205. The executors, within thirty days after qualifying as such . . . shall give written notice thereof to the Collector. The executor shall also, . . . file with the Collector a return under oath in duplicate, setting forth . . .

The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes." (Italics ours.)

Section 207 (Comp. 1916, § 6336½h).

"PAYMENT."

"Sec. 207. That the executor shall pay the tax to the collector or deputy collector. . . . If the amount of the tax as finally determined exceeds the amount so paid, the Commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth."

Section 209 (Comp. Stat. 1916, § 6336½j).

"LIEN."

"Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. . . ."

That the Commissioner himself recognized the fact that the Statute required him to determine the correct tax is clearly shown by the published regulation of the Department.

Regulation 68—Relating to Estate Tax, Article 67.

The above regulation provides as follows:

"ART. 67. *Investigation of returns.*—An investigation of every return for estate tax will be conducted to verify its accuracy. The investigation will be made by special officers of the Bureau. . . .

Such investigation will extend to all questions in so far as they have bearing both upon the tax liability of the estate under the Federal estate tax law and the taxing act of the particular State or Territory. . . . The investigations made in cooperation with the State or Territory are, like all others, limited to an ascertainment of information to aid

the Commissioner, who alone under the law is empowered to determine the tax, in arriving at a conclusion as to the Federal estate tax liability of the estate. . . ." (Italics ours.)

The evidence in the case (Rec. pp. 47–48) shows that an investigation of the estate of William E. Walker was made pursuant to the foregoing regulations. The Revenue Agent, who investigated the estate, testified at the trial as follows:

> "At one time he investigated the estate of William E. Walker. . . . He had special regulations under which he made his investigation. They had a so-called Confidential Manual. . . . The instructions are to the effect that inheritance tax records should be examined where available. In this instance in the Walker estate he made an investigation of the inheritance tax records in the Probate Court or in the (Massachusetts) Tax Commissioner's Office."

It is thus apparent that, in regard to Massachusetts tax, the Commissioner of Internal Revenue "was not deceived or misled by the failure to describe accurately the claim".

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

In view of the fact, therefore, that the original claim requested the amount "legally refundable" and the statutes and regulations provide that the Commissioner "alone under the law is empowered to determine" the proper tax, the petitioner respectfully submits that the original claim for refund even if no amendment had been filed was sufficient compliance with Section 3226 of the Revised Statute, as amended (43 Stat. c. 234, p. 342), which merely provides that "a claim for refund" must be filed in order to maintain the suit:

> "Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Sec-

retary of the Treasury established in pursuance thereof. . . ."

Second: The Regulations in Force at the time the Claim was Filed on June 20, 1925, did Not Expressly Require that the Claim Set Forth each Ground or Reason for Refund.

The attention of this Honorable Court is especially invited to the fact that the regulations of the Treasury Department promulgated under Section 3226 of the Revised Statutes which were in force at the time the original claim for refund was filed were not mandatory in requiring that the claim for refund "*must*" set forth and specify each reason, manner and respect in which the amount of the tax was wrongful or erroneous. Article 99 of Regulations 68, above referred to, provides as follows:

> "Art. 99. *Claim for refund.* A claim may be filed for refund of any tax, interest, or penalty, alleged to be excessive or illegal, . . . *All the facts relied upon in support of the claim should be clearly set forth under oath. . . .*" (Italics ours.)

It was not until May 1, 1929, that any regulation containing such mandatory language was promulgated.

Treasury Decisions 4265 (*C. B. VIII–1, Jan.–June, 1929, p. 110*). This regulation provides as follows:

> ". . . *The claim must set forth in detail and under each ground upon which a refund or credit is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. . . .*" (Italics ours.)

In view of the fact (1) that the original claim requested refund of such further amount as is legally refundable, (2) that the Regulations at the time the claim was filed prohibited the deduction of the Massachusetts tax and (3) were not mandatory in requiring that the claim set forth every respect in which the tax was excessive or erroneous, the petitioner respectfully submits that the original claim in and of itself was sufficient compliance with the statutes and regulations in regard to the filing of claims for refund.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

In the above case Mr. Justice Stone, who delivered the opinion of this Court, said:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery.

Third: The "Amendment" cured all defects, if any, in original Claim.

The petitioner respectfully submits that this is not a case where suit has been brought on a different *ground* from that presented to the Commissioner in the required claim for refund. The ground specified in the original claim, as well as that alleged in the amended declaration, is "that the Commissioner of Internal Revenue has collected a Federal Estate Tax from the estate which was excessive, wrongful and illegal". The question here presented is whether after suit has been brought to recover a portion of that same tax, a taxpayer, as plaintiff, may amplify his pleading and his claim for refund in order to show as many reasons as possible why that same tax is excessive. Since the original claim for refund was filed on time, the suit seasonably brought and the whole matter of the final determination of the tax was being held in abeyance the petitioner contends that the District Court did not err either in allowing the plaintiff to amend his declaration or in giving effect to the amendment to the claim which merely conformed to the amended declaration.

Revenue Act of 1918 (40 Stat. c. 18, p. 1144).
Code of Laws of the United States, Title 28 (Par. 777).
Revenue Act of 1928 (45 Stat. c. 852, p. 791).

The Revenue Act of 1918 provides the method of collecting taxes which had accrued under all prior acts and invests the District Courts of the United States with broad discretionary powers in regard to all questions arising under the Act. The pertinent provision of that Act is as follows:

Section 1318 (40 Stat. c. 18, p. 1148) :

"Sec. 1318: . . .

The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction . . . *to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act.* The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions." (Italics ours.)

Title 28, Par. 777, of the United States Code provides:

"777. *Defects of form; amendments.*—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe (R. S. Section 954)."

At the time the Court allowed the plaintiff to amend his declaration as well as when the amendment to the claim for refund was filed, the Revenue Act of 1928 was in force and the pertinent Section of that Act is as follows:

"SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or additional to

such tax) made after the enactment of this Act, shall be considered erroneous—

(a) If made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the Courts."

The attention of the Court is invited to the language of the above Section of the Act of 1928:

> "A refund of any portion of an internal revenue tax made after the expiration of the period of limitation for filing a claim and after the expiration of the period of limitation for filing a suit shall be erroneous, *unless within such period suit was begun by the taxpayer.*"

It is respectfully submitted that the filing of a valid claim, in the first instance, and the bringing of the suit on time suspended the running of the statute of limitations as to all matters connected with the final determination of the tax so that it was entirely proper for the District Court to allow the amended declaration and for the petitioner to file his amendment to the claim. This construction of Section 608 of the Revenue Act of 1928 is clearly supported by the regulations of the Treasury Department which were promulgated soon after the passage of that Act.

Treasury Decision 4235, C. B. VII-2, July–December, 1928, pp. 76–77.

This is a long Treasury Decision outlining the circumstances

under which claims for refund will be reopened and reconsidered by the Commissioner of Internal Revenue. As bearing upon the question of whether or not the bringing of a suit suspends the running of the statute so that a claim for refund may be amended while such suit is still pending, this Treasury Decision provides as follows:

"T. D.4235."

"REOPENING OF REFUND CLAIMS."

. . . . . .

"Any claim which has been disallowed will be reconsidered and allowed, at any time prior to the expiration of the statute of limitations for bringing suit, if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening".

. . . . . .

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved October 23, 1928.

A. W. MELLON,
Secretary of the Treasury."

If a claim for refund may be reconsidered after the four year period of limitation for filing such claim at any time prior to the expiration of the statute of limitation for bringing suit, an amendment to the claim for refund, which merely conforms to an allowed amended declaration and does not set up a new cause of action, is valid and proper "if it clearly appears that the" amendment "should be allowed on the merits", and this we think is especially true in view of the fact that *there is no statute or regulation which prohibits the filing of such an amendment while a suit is pending in the Federal District Court.*

Fourth: The Defendant Waived the Objection and is Estopped to Deny the Validity of the Amendment to the Claim for Refund.

The attention of the Court is called to the fact that the amendment to the claim for refund says that "the estate was

and is by law entitled to a further refund on account" of five (5) items therein specified (Rec. pp. 134–135). The fourth item is the Massachusetts inheritance tax and the fifth item is a claim for $1,000.00 for an error in computation, which was also for the first time claimed in the amendment. The evidence in the case (Rec. pp. 48–49 and 144–145) shows that the Commissioner of Internal Revenue acted upon the amendment in the regular official way and allowed the $1,000.00 item and made refund accordingly. This being true, it is respectfully submitted that the Commissioner waived the objection to the validity of the document. We contend that if the amendment was valid as to one item it was valid as to any other item which was proper and legal. Furthermore, it is clearly obvious that the reason the Massachusetts tax was not specified in the original claim was that Treasury Decision 2524 expressly prohibits the deduction of all State, transfer or succession taxes.

Arkwright Mills v. *United States,* 27 Fed. (2) 550;
Ritter v. *United States,* 28 Fed. (2) 265.

In the Arkwright Mills Case the Court said:

> "This failure to act in accordance with ordinary administrative diligence resulted to the prejudice of the petitioner, and I regard the government as estopped to now assert a right to take advantage of an error on the part of the petitioner for which its agents were directly responsible."

In the Ritter Case the Circuit Court of Appeals for the Third Circuit said:

> "It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. *Walker* v. *United States,* (C. C.) 189 F. 409; *Cook* v. *United States,* 91 U. S. 289, 23 L. 237; *United States* v. *Flint,* 25 Fed. Cas. p. 1107, No. 15,121. The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority."

Fifth: The Right of the Plaintiff to Amend his Declaration and his Claim for Refund to Conform thereto is Sustained Both by the Rules of the Court as well as by the Opinions of Decided Cases.

The rule of the Massachusetts Courts which has been adopted by the District Court for Massachusetts is embodied in General Laws of Massachusetts, Chapter 231, and provides as follows:

"AMENDMENTS."

"Section 51. The court may, at any time before final judgment, except as otherwise provided, allow amendments introducing a necessary party, discontinuing as to a party or changing the form of the action, and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or enable the defendant to make a legal defense."

Under the foregoing statute as well as under *Par. 777, Title 28* of the *Judicial Code, supra*, it is submitted that even if all of the "reasons" were not fully stated in the original claim for refund and in the original declaration, the cause of action remained unchanged and that the petitioner being within the jurisdiction of the District Court was clearly within his rights in appealing to the District Court to be allowed to amend his declaration and in amending his claim for refund to conform thereto both of which were in support of the same cause of action and merely showed an additional reason why a "further portion of the Federal estate tax should be refunded". If this is not true, the inevitable consequence is that the Commissioner of Internal Revenue can, by his regulations, completely nullify and set aside the rules of the District Court and deprive taxpayers of the full benefits of the right to amend, in so far as tax cases are concerned, although such right to amend is so fully sanctioned and granted by both State and Federal Courts in all other forms of action at law.

Swift & Co. (W. Va.) v. *United States*, 67 Ct. Cls. 322;

Lehigh & Wilkes Barre Coal Co. v. *United States*, 38 Fed. (2) 637;
Seaboard Air Line Railway v. *Renn*, 241 U. S. 290;
Texas & P. Ry. Co. v. *Cox*, 146 U. S. 593, 603;
Hutchinson v. *Otis Wilcox & Co.*, 190 U. S. 552.

In the case of *Swift & Co.* (*W. Va.*), *supra*, the Court of Claims said:

> "We think, therefore, that the original claim was proper as an amendment to the original consolidated return, and in connection with the statements subsequently filed by the parent company setting out the claim in more detail, was sufficient. The Commissioner of Internal Revenue had no difficulty whatever after the filing of these papers in determining that the plaintiff was entitled to the refund. If there was any insufficiency in these statements of the parent company taken together, it was, we think, merely one of form and could be cured by such an amendment as the plaintiff subsequently filed, although it was made after the expiration of the period of limitations."

In the *Lehigh & Wilkes Barre Coal Co. Case*, *supra*, which the Government did not appeal, the Court said:

> "The question therefore raised by the affidavit of defense raising questions of law is whether the claim for refund filed February 10, 1925, was sufficient to toll the statute of limitations and to allow the amendment of June 25, 1926. Under the law, a claim for refund must be filed before the expiration of five years after the date the return was due, March 15, 1920. . . .
>
> Regardless of any defect of form or sufficiency in the original claim for refund, the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the statute of limitations, and the impossibility on the part of the petitioner to file a more specific claim within the period of the statute of limitations and the fact that no objection was made to the form of the petitioner's original claim for refund, which amounts to a waiver of any irregularity, and the subsequent amendment

specifying the grounds of petitioner's claim for a refund prior to the final rejection, made the claim effective. . . ."

In the case of *Hutchinson* v. *Otis Wilcox & Co., supra*, Mr. Justice Holmes delivered the opinion of the Court, in the course of which he said:

". . . The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The cause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitation has run, when the original declaration was bad. *Sanger* v. *Newton*, 134 Mass. 308: See *Re Parkes*, 10 Nat. Bankr. Reg. 82, Fed. Cas. No. 10,754; *Re Baxter*, 12 Fed. 72; *Re Glass*, 119 Fed. 509. The proceedings remained in the district court, notwithstanding the appeal and the amendment properly was allowed there."

In *Seaboard Air Line Ry. Co.* v. *Renn*, Mr. Justice Van DeVanter said:

"If the amendment merely expended or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. . . . In these circumstances, while the question is not free from difficulty, we cannot say that the Court erred in not treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and *related back to the commencement of the suit* which was before the limitation had expired."

Sixth: The Cases Relied Upon by the Respondent are Not in Point and Applicable to the Facts in the Case at Bar.

Both in the District Court and in the Circuit Court of Appeals the respondent cited numerous cases which have held that a suit cannot be maintained on a different ground than that which

has been set forth in a claim for refund. Among these cases are the following:

Arizona Commercial Mining Co. v. *Casey*, 32 Fed. (2d) 288;
Braun v. *Lewellyn*, 38 Fed. (2d) 477;
Feather River Lumber Co. v. *United States*, 66 Ct. Cls. 54;
Jonesboro Grocery Co. v. *United States*, 66 Ct. Cls. 320;
Meinwrath Brokerage Co. v. *Crooks*, 28 Fed. (2d) 991;
Ordway v. *United States*, 37 Fed. (2d) 19;
Paul Jones & Co. v. *Lucas*, 33 Fed. (2d) 907;
Phoenix Glass Co. v. *United States*, 34 Fed. (2d) 217;
Red Wing Malting Co. v. *Willcuts*, 15 Fed. (2d) 626;
Ritter v. *United States*, 28 Fed. (2d) 265;
Southwestern Oil & Gas Co. v. *United States*, 29 Fed. (2d) 404;
Stauffer Eshleman & Co., Ltd. v. *United States*, 66 Ct. Cls. 277.

It seems unnecessary to treat these cases severally. It is sufficient to state that all of them are distinguishable from the case at bar in one or more essential respects, among which are the following:

1. In those cases the taxes involved were not *estate taxes* but other forms of taxes where the Commissioner was not required by law to determine the correct amount of the tax in the first instance.

2. In those cases it was apparent that the matters which the plaintiffs relied upon in the suits were of such nature that the Commissioner did not have, or could not reasonably be supposed to have had, full knowledge at the time he made his determination of the tax or when the suits were brought.

3. In those cases the grounds for recovery upon which the taxpayers relied in their suits were available to them and could have been set forth in a claim for refund as well as in a suit, in the sense that such grounds or reasons were not prohibited by any published ruling of the department, as was the deduction of State inheritance taxes. (Treasury Decision 2524.)

4. In those cases the question of law in regard to the plain-

tiffs' right to maintain their action because of the insufficiency of the claim for refund was seasonably and properly raised either by way of motion to dismiss plea in abatement or demurrer, and the defendants did not answer to the merits of the case.

5. In several of those cases no claim whatsoever for the tax sought to be recovered was ever filed with the Commissioner of Internal Revenue before suit was brought and in none of them was any amendment to the claim filed while the suit was still pending.

6. None of those cases involved such questions of waiver and estoppel either on the part of the Commissioner or in the proceedings in Court as are involved in the case at bar.

Seventh: The Contentions of the Respondent are Not Sustained by Recent Decisions of this Honorable Court.

The most recent decisions of this Honorable Court involving claims for refund and the requirements in regard thereto, are:

Bonwit Teller & Co. v. *United States*, 51 S. Ct. 395; 283 U. S. 258;

United States v. *Felt & Tarrant Mfg. Co.*, 51 S. Ct. 376; 283 U. S. 269:

United States v. *Swift & Co.*, 51 S. Ct. 202; 282 U. S. 468;

Lewis et al., Trustees, v. *Reynolds, Collector*, (unreported; decided January 4, 1932).

In the *Bonwit Teller Case* this court held that Section 3226 of the Revised Statutes did not apply because the second count in the petition alleged "an account stated, showing that there is due the plaintiff the amount claimed". Similarly in the case at bar the second count of the original declaration, as well as Count II of the amended declaration (Rec. p. 16), alleges that the defendant owes the plaintiff "for money had and received by the defendant to the plaintiff's use". If, therefore, that portion of the tax resulting from the refusal of the Commissioner of Internal Revenue to deduct the Massachusetts tax was, as a matter of law, refundable, the petitioner respectfully submits that the Bonwit Teller Case is in point and sustains the contention of the petitioner.

As to the Felt & Tarrant Mfg. Company case, the petitioner respectfully submits that that case is clearly distinguishable from the case at bar in the following respects:

(1) In that case the taxes involved were income taxes and the law did not impose upon the Commissioner of Internal Revenue the positive duty of determining and establishing the true and legal amount of the tax in the first instance, so that the claim for refund which merely stated that it was "filed to protect all possible legal rights of the taxpayer" was clearly insufficient to comply with the requirements of the statute and the regulations.

(2) In that case, at no time during the proceedings before the Bureau of Internal Revenue was the ground for refund which was asserted in the suit ever brought to the attention of the Commissioner of Internal Revenue, so that he might pass thereon.

(3) In that case the tax was paid on June 15, 1918, but the suit was not brought until February 14, 1927, which was more than five years as provided by the statute.

(4) In that case no amendment to the original claim for refund specifying any grounds was ever filed with the Commissioner of Internal Revenue either before or after the suit had been brought.

The case of *United States* v. *Swift & Company*, which involved the same set of facts, passed upon by the Court of Claims in *Swift & Co. (of W. Va.)* v. *United States, supra*, is in many respects in point and pertinent to the issues in regard to the claim for refund which are involved in the case at bar. In that case the taxpayer filed an original claim for refund and later filed an amendment. Mr. Justice Roberts, who delivered the opinion in the case, in referring to the question of the amendment, said:

> "The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund."

The case of *Lewis et al.* v. *Reynolds* seems to be directly in point on some of the issues in the case at bar. In that case the Commissioner of Internal Revenue allowed the deduction

of the State inheritance tax of Wyoming. It is clear from the language of the opinion that if in that case the State tax had been the only issue involved, the estate would have been granted a refund. In the course of the opinion in the case Mr. Justice McReynolds quoted the language of the Circuit Court of Appeals for the Tenth Circuit, which said:

> "The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

It is respectfully submitted that the language quoted above supports the petitioner's contention that the filing of the claim for refund and bringing the suit within the statutory periods suspended the running of the statute and held in abeyance the determination of the entire tax liability of the estate.

Upon all of the facts and the law of the case, therefore, the petitioner respectfully submits that the language used in the opinion of the District Court in regard to the original claim for refund and the amendment thereto are sound and just (Rec. pp. 153–154):

> "In the case at bar, the claim for refund filed June 20, 1925, conformed to the requirements of the Statutes and Regulations. . . . This amendment moreover was but a formal presentation of claims for refund that had been informally presented and discussed at hearings held upon the original claim when it was reopened after the decision of the Circuit Court of Appeals. At these conferences the whole extent of the liability of the estate for the Federal estate tax was considered, and the Commissioner, or those who represented him, had abundant opportunity to pass upon the right of the estate to claim the deduction in ques-

tion. . . . It has been urged, and I think appropriately, that in a matter involving an estate tax, it would be peculiarly compatible with justice to give effect to such an amendment inasmuch as the statute lays upon the Commissioner the positive duty of assessing the correct tax and refunding any excess. To hold that a late amendment to a claim filed on time answers the statute, does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determination of the tax liability, and before suit is brought to recover any tax illegally collected."

CONCLUSION.

Upon all of the facts and the law, the petitioner respectfully submits that the decision of the District Court should be sustained and that the judgment of the Circuit Court of Appeals be reversed and that the issues of this case suggest the application of the rule that all doubts, if any, in regard to the disputed questions should be resolved against the defendant and in favor of the plaintiff.

Gould v. *Gould*, 245 U. S. 151, at page 153:
United States v. *Merriam*, 263 U. S. pp. 187, 188.
Schwab v. *Doyle*, 258 U. S. 529, at page 536.

In *Gould* v. *Gould*, Mr. Justice McReynolds said:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *United States* v. *Merriam*, Mr. Justice Sutherland quoted a strong statement of Lord Cairns and said:

"In statutes levying taxes the literal meaning of the words employed is most important. . . . If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In *Shwab* v. *Doyle*, Mr. Justice McKenna said:

> "But, granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

Respectfully submitted,

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Of Counsel,
EVERETT S. WHITE.

FILE COPY

No. 468

In the Supreme Court of the United States

OCTOBER TERM, 1931

ROBERT M. LEACH, EXECUTOR, PETITIONER

v.

MALCOLM E. NICHOLS, FORMERLY COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 147–157) is reported in 42 F. (2d) 918. The opinion of the Circuit Court of Appeals for the First Circuit (R. 163–174) is reported in 50 F. (2d) 787.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 10, 1931. (R. 163–174.) A petition for rehearing (R. 175) was filed July 9, 1931, and was denied July 22, 1931 (R. 195). The petition

for a writ of certiorari was filed October 19, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

We contend that the sole question which need be considered is the following:

Whether a District Court may consider a ground for refund of federal estate taxes imposed under the Revenue Act of 1916 when the amended declaration upon which the plaintiff went to trial in that court made no averment that any claim for refund had been filed setting forth that ground, and, as a matter of fact, no such ground was asserted in any claim for refund until after the amended declaration was filed, and more than seven years after the payment of tax, when the taxpayer filed with the Collector what he designated an "amendment to claim for refund."

The petitioner here seeks a review of the following questions:

1. Whether the respondent took procedural steps in the District Court sufficient to permit him to contend in the Circuit Court of Appeals that Massachusetts legacy and succession taxes were not lawful deductions from a decedent's gross estate for the purpose of computing the Federal Estate Tax under the Revenue Act of 1916.

2. Whether such Massachusetts taxes were deductible.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the appendices to this brief, *infra*, pp. 12–17.

STATEMENT

This action was brought in the District Court by the petitioner, as executor, to recover a portion of the Federal estate tax collected by the respondent from the estate of William E. Walker, who died a resident of Massachusetts on November 9, 1918. (R. 20, 163.)

In May, 1919, the executor filed a return and paid an estate tax of $37,700.68. (R. 21, 163.) The Commissioner of Internal Revenue on March 18, 1922, determined that the tax due was $89,735.64. (R. 21.) On March 27, 1922, the additional tax was paid. (R. 22.)

On June 20, 1925, the executor filed a claim for refund of $49,634.70, with interest of $10,423.39 (R. 24–30, 59, 65), setting forth two grounds for the claim, which did not include the contention as to the Massachusetts taxes later asserted. On December 1, 1925, suit was instituted by the executor in the District Court for Massachusetts, and on March 16, 1926, the original declaration was filed in this action, based only upon the two grounds specified in the claim of June 20, 1925. (See R. 164.) The case was tried on this declaration, judgment was entered for the defendant, but was reversed on appeal (23 F. (2d) 275), and the case was sent back for a new trial (R. 3).

On October 8, 1928, the District Court allowed plaintiff to amend his declaration, and he then for the first time claimed deductions from decedent's gross estate for certain matters, including the Massachusetts legacy and succession taxes. (R. 12–16.) In this amended declaration there was no allegation that any claim for refund had ever been filed. The defendant filed an amended answer (R. 19–20), setting up as a defense that in the claim for refund filed June 20, 1925, the deductibility of the Massachusetts taxes was not mentioned and that consequently that claim did not furnish sufficient ground for recovery of any part of the Federal estate tax.

In May, 1929, three years after the time for filing a claim for refund had expired under the statute, and more than three years after this action was brought, and seven months after the filing of the amendment to his declaration (which, of course, did not aver that a claim for refund on the new grounds had been filed), the executor filed with the Collector what he described as an "Amendment to Claim for Refund of Taxes illegally collected," which set up a claim for a refund based upon the deductibility of the Massachusetts taxes and other matters not involved in the instant petition. (R. 55, 65.)

In February, 1930, the case was tried before the District Judge, a jury having been waived in writing. (R. 32–33.) The defendant moved at the opening of the second trial that the action be dismissed

on the ground that the declaration failed to allege that any claim for refund because of the Massachusetts taxes had been filed with the Commissioner prior to the commencement of the action or prior to the date of the amendment to the declaration in September, 1928, and at the close of the evidence the defendant renewed the motion on the ground that the evidence showed that no claim for a refund on the new grounds was presented within four years of the payment of the tax or prior to the bringing of the action or the date of the amendment. (R. 35, 53.)

The District Court disallowed certain deductions claimed, but held that the plaintiff was entitled to recover "to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts." (R. 156.)

The respondent appealed from the judgment of the District Court. The Circuit Court of Appeals did not pass on the question whether the claims set up in the "Amendment to Claim for Refund" were barred, but held that Massachusetts legacy and succession taxes were not lawful deductions from a decedent's gross estate for the purpose of computing the Federal Estate Tax under the provisions of Section 203 of the Revenue Act of 1916. (R. 169.)

ARGUMENT

The petitioner's contentions relate to the deductibility of Massachusetts taxes. But regard-

less of the merits of these contentions, we think it so plain that they need not be considered that we oppose the granting of the writ. This position is based on the fact which clearly appears from the record that the petitioner did not file any claim for refund, stating his contentions with respect to the Massachusetts tax until the statutory period for filing claims for refund had expired, and until after the filing in the District Court of his amended declaration on which he went to trial.

This defense was raised by the answer to the amended declaration in the District Court (R. 19), and the facts on which it is based appear in the findings of fact. (R. 54–65.) The question was decided by the District Court adversely to the respondent's contentions. (R. 147, 151–157.) It was duly presented to the Circuit Court of Appeals by proper assignments of error. (R. 158–160.) That Court referred to the question in its opinion (R. 167), but decided the case on the ground that in any event the Massachusetts taxes were not deductible.

The tax in question in this case was paid by the petitioner on March 27, 1922. (R. 22.) On June 20, 1925, the petitioner filed a claim for refund in which two grounds were stated, neither of which related to the present question concerning the Massachusetts taxes. (R. 59, 65.) The present action was commenced on December 1, 1925. (R. 60, 65.) On January 16, 1926, the Commissioner of Internal

Revenue rejected the claim for refund. (R. 60, 65.) On October 8, 1929, the petitioner filed an amended declaration. (R. 12.) In this amended declaration the petitioner asserted for the first time his contention regarding the Massachusetts tax, but there is no allegation in this declaration that any claim for refund had ever been filed or rejected by the Commissioner. On May 3, 1929, the petitioner filed with the respondent an amendment to his original claim for refund, asserting his claim with respect to the Massachusetts taxes for the first time. (R. 55, 65.)

This recital of the facts shows that the petitioner did not comply with the statutory requirements regarding claims for refund. Section 3226 of the Revised Statutes, as reenacted in Section 1113 (a) of the Revenue Act of 1926 (*infra*, p. 15) provides that no suit for the recovery of a tax shall be maintained in any court—

> until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof.

Article 99 of Regulations 68 (*infra*, p. 17) requires that all facts relied upon in support of a claim shall be clearly set forth under oath. The claim for refund filed June 20, 1925, though filed in time, does not set forth any facts in regard to

Massachusetts taxes and makes no mention of the Massachusetts taxes. Under Section 3228 of the Revised Statutes, as amended by Section 1012 of the Revenue Act of 1924 (*infra*, pp. 14–15), and by Section 1112 of the Revenue Act of 1926 (*infra*, pp. 14–15), all claims for refund must be presented within four years after the payment of the tax. In the present case this period expired March 27, 1926. It was not until May 3, 1929, more than three years later, that the petitioner ever filed any claim for refund relying on the ground which he now asserts. And since even this claim was not presented until after the amended declaration in this case was filed, there is no allegation in that declaration with respect to this or any other claim for refund.

Under the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, it is plain that the petitioner is barred from recovering the tax he seeks to recover.

The situation is not altered because the petitioner's claim filed May 3, 1929, was in the form of an amendment to a claim filed June 20, 1925. Although an informal, though valid, claim may possibly be amended after the statutory period has run, it is clear that a new ground for refund can not be added to a claim after the time for filing claims has passed. *Jonesboro Grocer Co.* v. *United States*, 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Swift & Co.* v. *United States*, 68 C. Cls. 97, 105,

affirmed on another point, 282 U. S. 468; *Art Metal Construction Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863; *Zeller* v. *United States*, 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied, 283 U. S. 863. See *Feather River Lumber Co.* v. *United States*, 66 C. Cls. 54, certiorari denied, 279 U. S. 837; *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d).

The petitioner argues that the question as to the deductibility of the Massachusetts taxes was not properly before the Circuit Court of Appeals inasmuch as, he contends, the respondent did not take in the District Court the procedural steps which give a party the right to have a point considered by the appellate court. (See his brief, pp. 4–5.) It seems unnecessary now to discuss this matter. The error of the District Court in holding the Massachusetts taxes deductible (assuming it to be error) was one apparent upon the pleadings and upon the facts as found by that court. The outstanding fact is that the Circuit Court of Appeals did consider the matter.

The decision of the Circuit Court of Appeals in the instant case, holding that the Massachusetts taxes are not deductible in computing the gross estate under the Revenue Act of 1916 is squarely in conflict with the decision of the Court of Claims

in *Merrill* v. *United States*, 66 C. Cls. 136, which also dealt with the Massachusetts taxes under the same Act. There are a few cases involving the Massachusetts tax which are still pending. They are not numerous, and the question does not arise under the later Revenue Acts, all of which specifically provide that "estate, succession, legacy, or inheritance taxes shall not be deducted." (See pp. 12–13, *infra*.) There are several cases pending involving the treatment of taxes of other States under the 1916 Act, but a review of the instant case would not be conclusive of those cases inasmuch as this Court has held that it "will follow the decisions of the State courts as to the meaning and proper application of the state transfer tax law." *Keith* v. *Johnson*, 271 U. S. 1, 8. See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270, in which this Court accepted the view that the Massachusetts tax is a tax upon "succession." Cf. *Coolidge* v. *Long*, 282 U. S. 582.

Conclusion

Since we believe it clear that the petitioner can not recover in view of his failure to file a proper claim for refund within the statutory period, we oppose the petition in this case, in spite of the fact that the decision below on the question of the deductibility of the Massachusetts taxes is in conflict with the decision in *Merrill* v. *United States*, 66 C. Cls. 136.

Respectfully submitted.

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NOVEMBER, 1931.

APPENDIX A

STATUTES

Revenue Act of 1916, c. 463, 39 Stat. 756, 778:

> SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; * * *

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098:

> SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise,

and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342, 343:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918), which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

(U. S. C., Title 26, Sec. 157.)

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 30 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act. (U. S. C., Title 26, Sec. 156.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 115:

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C., Supp. IV, Title 26, Sec. 157.)

Section 1113 of the 1926 Act (U. S. C., Supp. IV, Title 26, Sec. 156) reenacted Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924, above quoted.

APPENDIX B

General Laws of Massachusetts (1921), Vol. 1, Chapter 65 (p. 669):

TAXATION OF LEGACIES AND SUCCESSIONS

SECTION 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy sub-

ject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax.

SECTION 18. If a legacy subject to said tax is charged upon or payable out of real estate, the heir or devisee, before paying said legacy, shall deduct said tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien upon said real estate until it is paid. Payment thereof may be enforced by the executor, administrator or trustee in the same manner as the payment of the legacy itself could be enforced.

APPENDIX C

Treasury Decision 2524 (Treasury Decisions, Internal Revenue, Volume 19, p. 159):

ESTATE TAX—INHERITANCE TAXES

State inheritance taxes not deductible under Title II, act of September 8, 1916—T. D. 2395 of November 17, 1916, revoked

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., September 10, 1917.

To collectors of internal revenue:

An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or

legacy taxes are not "such other charges against the estate as are allowed by the laws of the jurisdiction," and accordingly are not deductible in arriving at the amount of Federal estate tax. T. D. 2395 of November 19, 1916, is hereby revoked.

* * * * *

Treasury Regulations 68 (1924 ed.), relating to Estate Tax under the Revenue Act of 1924:

ART. 99. *Claim for refund.*—A claim may be filed for refund of any tax, interest, or penalty, alleged to be excessive or illegal, where the payment thereof has been made either upon the basis of the return or as a result of the audit and review thereof. Claims for refund must be presented to the Commissioner within four years next after payment of the amount sought to be refunded. Such claim must be made on Form 843. As in the case of a claim for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

No. 468

In the Supreme Court of the United States

October Term, 1931

ROBERT M. LEACH, EXECUTOR, PETITIONER

v.

MALCOLM E. NICHOLS, FORMERLY COLLECTOR OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 147–157) is reported in 42 F. (2d) 918. The opinion of the Circuit Court of Appeals for the First Circuit (R. 163–173) is reported in 50 F. (2d) 787.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 10, 1931. (R. 195.) A petition

for rehearing (R. 175) was filed July 9, 1931, and was denied July 22, 1931 (R. 195). The petition for a writ of certiorari was filed October 19, 1931, and was granted December 7, 1931. (R. 196–197.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner can maintain this suit where the claim for refund on which it is based did not mention the ground on which the suit is brought, and this ground was not raised until an amendment to the claim for refund was filed after the statutory period for filing a claim had expired and after the institution of the suit.

2. Whether Massachusetts legacy and succession taxes were deductible from a decedent's gross estate for the purpose of computing the Federal estate tax under the Revenue Act of 1916.

3. Whether the issue of deductibility was properly before the Circuit Court of Appeals for decision.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendices to this brief, *infra*, pp. 19–25.

STATEMENT

This action was brought in the District Court by the petitioner, as executor, to recover a portion

of the Federal estate tax collected by the respondent from the estate of William E. Walker, who died a resident of Massachusetts on November 9, 1918. (R. 20, 163.)

In May, 1919, the executor filed a return and paid an estate tax of $37,700.68. (R. 21, 163.) The Commissioner of Internal Revenue on March 18, 1922, determined that the tax due was $89,735.64. (R. 21.) On March 27, 1922, the additional tax was paid. (R. 22.)

On June 20, 1925, the executor filed a claim for refund of $49,634.74, with interest of $10,423.29 (R. 24–30, 59, 65), setting forth two grounds for the claim, which did not include the contention as to the Massachusetts taxes later asserted. On December 1, 1925, this suit was instituted by the executor in the District Court for Massachusetts, and on March 16, 1926, the original declaration was filed in this action, based only upon the two grounds specified in the claim of June 20, 1925. (See R. 164.) The case was tried on this declaration, judgment was entered for the respondent, but was reversed on appeal (23 F. (2d) 275), and the case was sent back for a new trial (R. 3).

On October 8, 1928, the District Court allowed the petitioner to amend his declaration, and he then for the first time claimed deductions from the decedent's gross estate of certain items, including the Massachusetts legacy and succession taxes. (R. 12–16.) In this amended declaration there was no allegation that any claim for refund had ever

been filed. The respondent filed an amended answer (R. 19–20), setting up as a defense that in the claim for refund filed June 20, 1925, the deductibility of the Massachusetts taxes was not mentioned and that consequently that claim did not furnish sufficient ground for recovery of any part of the Federal estate tax.

On May 3, 1929, three years after the time for filing a claim for refund had expired under the statute, more than three years after this action was brought, and seven months after the filing of the amendment to his declaration (which, of course, did not aver that a claim for refund on the new grounds had been filed), the executor filed with the Collector what he described as an "Amendment to Claim for Refund of Taxes Illegally Collected," which set up a claim for a refund based upon the deductibility of the Massachusetts taxes and other matters no longer in controversy. (R. 55, 65, 133–135.)

In February, 1930, the case was tried to the court, a jury having been waived in writing. (R. 32–33.) The respondent moved at the opening of the second trial that the action be dismissed on the ground that the declaration failed to allege that any claim for refund because of the Massachusetts taxes had been filed with the Commissioner prior to the commencement of the action or prior to the date of the amendment to the declaration in September, 1928, and at the close of the evidence the respond-

ent renewed the motion on the ground that the evidence showed that no claim for a refund on the new grounds was presented within four years of the payment of the tax or prior to the bringing of the action or the date of the amendment. (R. 35, 53.)

The District Court disallowed certain deductions claimed, but held that the petitioner was entitled to recover "to the extent that the tax was increased by the refusal of the Commissioner to deduct the legacy and succession tax paid to the Commonwealth of Massachusetts." (R. 156.)

The respondent appealed from the judgment of the District Court. The Circuit Court of Appeals did not pass on the question whether the claims set up in the "Amendment to Claim for Refund" were barred, but held that the Massachusetts legacy and succession taxes were not lawful deductions from a decedent's gross estate for the purpose of computing the Federal Estate Tax under the provisions of Section 203 of the Revenue Act of 1916. (R. 169.)

SUMMARY OF ARGUMENT

I

Recovery on the ground that the Massachusetts succession tax was deductible from the gross estate for Federal estate tax purposes is barred because no claim for refund on such a ground was timely filed. One claim for refund was filed in due time. It did not suggest this ground. There was no indication

to Government officials that the petitioner would rely on the ground now raised until more than four years after payment of the tax sought to be recovered. Then this suit was brought alleging this ground in an amended declaration. But as no claim for refund on this ground had been filed, we contend no recovery may be allowed. The "Amendment to the Refund Claim," filed even later than the amended declaration, can not operate to remove the bar of the statute of limitations.

II

The Revenue Act of 1916 permits the deduction only of charges that affect an estate as a whole and not those that affect solely the rights of individual beneficiaries. The Massachusetts succession and legacy tax falls within the latter category. The declaration of the Supreme Judicial Court of Massachusetts that the tax is not on the decedent or his estate but on the beneficiaries and their privilege of succession has been accepted by this Court as a true statement of the character of the tax, and must be accepted as controlling in this case. Accordingly, the petitioner was not entitled to the deduction claimed.

III

The question of the deductibility of the Massachusetts taxes was raised by the amended pleadings. It was decided by the District Court and was the sole basis for the recovery allowed. The ruling

was assigned as error. (R. 159, 160.) It follows that the Circuit Court of Appeals could properly act on the issue. Furthermore, the petitioner can not recover unless this issue is decided in his favor.

ARGUMENT

I

THE PETITIONER'S FAILURE TO FILE A CLAIM FOR REFUND PRESENTING THE GROUNDS NOW URGED WITHIN THE STATUTORY PERIOD PROHIBITS ANY RECOVERY.

Section 3226 of the Revised Statutes, reenacted in Section 1113 of the Revenue Act of 1926 (*infra*, p. 22), provides that—

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax * * * until a claim for refund or credit has been duly filed * * * according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury * * *.

Regulations 68 (1924 ed.) in force when the first claim for refund was filed on June 20, 1925, provided in Article 99 (*infra*, p. 25) that—

> Claims for refund must be presented to the Commissioner within four years next after payment of the amount sought to be refunded. Such claim must be made on form 843. * * * All the facts relied upon in support of the claim should be clearly set forth under oath * * *.

The tax in question in this case was paid by the petitioner on March 27, 1922. (R. 22.) On June

20, 1925, the petitioner filed a claim for refund in which two grounds were stated, neither of which related to the present question concerning the Massachusetts taxes. (R. 59, 65.) The present action was commenced on December 1, 1925, less than six months after the filing of the claim and prior to its rejection. (R. 60, 65.) On January 16, 1926, the Commissioner of Internal Revenue rejected the claim for refund. (R. 60, 65.) On March 27, 1926, the four-year period for filing claims for refund expired. The contention that the Massachusetts tax was deductible from the gross estate for Federal estate tax purposes, was never brought to the Commissioner's attention until March 6, 1928, when at some hearings before the Commissioner this contention was informally suggested to him. On October 8, 1928, the petitioner filed an amended declaration. (R. 12.) In this amended declaration the petitioner asserted for the first time in court his contention regarding the Massachusetts taxes, but there is no allegation in this declaration that any claim for refund had ever been filed or rejected by the Commissioner. On May 3, 1929, the petitioner filed with the respondent an "amendment" to his original claim for refund, asserting his claim with respect to the Massachusetts taxes for the first time. (R. 55, 63.)

When the first refund claim was filed on June 20, 1925, the petitioner had every opportunity to base his claim upon this contention. His neglect to

suggest the deductibility of the Massachusetts succession tax was not due to lack of opportunity but rather to his belief that a claim for such a deduction would be rejected. This fact was accepted by the District Court of Massachusetts as excusing the petitioner's failure to include this ground in his first claim for refund and thus inform the Commissioner of his position. The District Court stated (R. 155):

> Nor do I think the plaintiff should be prejudiced by his failure to include in the original claim for refund a claim based on the refusal of the Commissioner to deduct the Massachusetts tax. The published opinions and rulings of the Commissioner extant when the claim was filed precluded, so far as the taxing authorities were concerned, all hope and expectation of such a deduction from the gross estate. The law does not require an act that would have been idle or useless at the time.

There can be no doubt but that the District Court erred in this conclusion. The identical question was presented to this Court in *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269, where this Court stated (p. 273):

> The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for

suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute and "they mark the conditions of the claimant's right."

We contend that the first claim for refund filed June 20, 1925, can not support the present suit for it gave the taxing officers no indication that a refund would be sought on the ground that the Massachusetts tax was deductible from gross estate. *Red Wing Malting Company* v. *Willcuts,* 15 F. (2d) 626, 635 (C. C. A. 8th), certiorari denied, 273 U. S. 763. The petitioner's contention that the original claim for refund was sufficient because it specified "or such greater amount as is legally refundable" (Br. 28) is withut merit. *Jonesboro Grocer Co.* v. *United States,* 66 C. Cls. 320, 326, certiorari denied, 280 U. S. 562; *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863; *Zeller* v. *United States,* 46 F. (2d) 1023 (C. C. A. 2d), certiorari denied, 283 U. S. 863. Furthermore, the claim which this Court held insufficient in *United States* v. *Felt & Tarrant Co., supra,* stated that it was filed to "protect all possible legal rights of the taxpayer."

But the petitioner contends that the real ground for refund was set out in the second claim for refund which he entitled an "Amendment to the Claim for Refund," and that the situation is the same as if the real ground for refund had been

called to the attention of the Government officials in June, 1925. This second claim sets up an entirely new basis for refund. The situation is similar to that presented by an amended declaration which seeks to introduce a new cause of action or to bring in new parties defendant. With respect to the statute of limitations such an amendment does not date back to the original declaration but is equivalent to a new declaration. *Miller* v. *McIntyre,* 6 Peters 61; *Sicard* v. *Davis,* 6 Peters 124. See also *Seaboard Air Line Railway* v. *Renn,* 241 U. S. 290. We submit that this amended claim, filed more than four years after the payment of the taxes sought to be recovered is ineffective as a basis for this suit. *Jonesboro Grocer Co.* v. *United States, supra,* 66 C. Cls. 320, certiorari denied, 280 U. S. 562.

Under Section 3228 of the Revised Statutes, as amended by Section 1012 of the Revenue Act of 1924, and Section 1112 of the Revenue Act of 1926 (*infra,* pp. 19–20, 21–22) the petitioner was required to file his claim for refund within four years of the date of payment of the tax. The bar of this statute of limitations fell on March 27, 1926. It was not until two years later that the question of the deductibility of the Massachusetts tax was informally brought to the Commissioner's attention at a hearing. Two and one-half years after the bar of the statute had fallen the petitioner amended his declaration to add this new ground as a new cause

of action. More than three years after the bar had fallen he attempted to amend his first claim for refund. But R. S. 3226 (*infra,* pp. 20–21) expressly requires the filing of a claim for refund prior to a suit or proceeding for the recovery of the tax. The amendment of the petitioner's declaration to include this cause of action on October 8, 1928 (R. 12), was seven months before the amended claim for refund was filed on May 3, 1929 (R. 133). Consequently, even if the amended claim were valid, this suit was prematurely brought.

II

THE MASSACHUSETTS SUCCESSION AND LEGACY TAX WAS NOT DEDUCTIBLE FROM THE DECEDENT'S ESTATE FOR FEDERAL ESTATE TAX PURPOSES

Section 203 (a) 1 of the Revenue Act of 1916 (*infra,* p. 19) provides in substance that the value of the net estate shall be determined by deducting from the value of the gross estate, among other things, "claims against the estate, * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." This Court has interpreted the provision "charges against the estate" as charges that affect the estate as a whole. Taxes assessed on the right of succession of the individual beneficiaries are not deductible. *New York Trust Company* v. *Eisner,* 256

U. S. 345, 350; *United States* v. *Woodward,* 256 U. S. 632, 635.

This Court has always recognized as final the construction and definition of a state taxing act by the court of last resort of the State in question. Any conflict of authority between the various States on similar or analogous statutes is of no significance. The court of the State concerned has final jurisdiction to determine the construction and effect of its own taxing laws. *New York Trust Company* v. *Eisner, supra; Keith* v. *Johnson,* 271 U. S. 1; *United States* v. *Mitchell,* 271 U. S. 9; *Stebbins* v. *Riley,* 268 U. S. 137. In the event of conflicting decisions by the state court of last resort the latest decision is considered the authoritative and definitive construction. *Keith* v. *Johnson, supra.*

The Supreme Judicial Court of Massachusetts has consistently interpreted the legacy and succession tax of that Commonwealth as being a succession tax levied upon the right of the beneficiary to receive the bequest. *Attorney General* v. *Stone,* 209 Mass. 186, 190; *Magee* v. *Commissioner,* 256 Mass. 512; *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 267 Mass. 240. This Court has already recognized with approval these Massachusetts decisions as defining the tax here involved as a succession tax. *Saltonstall* v. *Saltonstall,* 276

U. S. 260, affirming 256 Mass. 519. There this court said (pp. 269–270):

> In this and earlier cases the Massachusetts court has held that the tax authorized by these statutes is a tax upon "succession" which includes the "privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property." * * * This construction of the statutes by the state court we accept.

Any possible remaining doubt as to the nature of the Massachusetts tax is dispelled by the decision of the Supreme Judicial Court in *Coolidge* v. *Commissioner*, 268 Mass. 443, 447, where that court reiterated its earlier statements that the tax was a succession tax, and quoted with approval the above characterization of the tax by this Court in the *Saltonstall* case. In reversing this Massachusetts decision on other grounds in *Coolidge* v. *Long*, 282 U. S. 582, 596, this Court again referred to the Massachusetts court's construction of the state law as a succession tax.

The petitioner suggests possible conflicts in the earlier decisions of the Massachusetts court on the nature and incidents of this tax. We submit that the quotations from these authorities do not indicate any vacillation of opinion by that tribunal as to the nature of the tax. In any event the most recent consideration of the problem by the Supreme Judicial Court in the *Coolidge* case is clear and unequivocal and renders immaterial any earlier

inconsistent statements by the court. The petitioner also relies on *Merrill* v. *United States*, 66 C. Cls. 136, and *Thayer* v. *Malley*, 3 F. (2d) 194, where the Court of Claims and the District Court of Massachusetts held that the Massachusetts tax was a transfer tax rather than a succession tax and was therefore deductible from the gross estate of the decedent. But these are opinions of Federal courts and their construction of the Massachusetts statute is no authority as to the actual character of the tax. The only effect of these decisions as to the nature of the tax is their possible persuasive influence upon the Massachusetts court. But the Massachusetts court despite these decisions has the ultimate responsibility of finally determining the nature of the taxing statute. Moreover these decisions of the Federal courts were rendered prior to the opinion by the Supreme Judicial Court of Massachusetts in the *Coolidge* case in 1929, and in view of that later decision can have no weight whatsoever.

Petitioner insists that the Massachusetts tax, even if theoretically a succession tax upon the right of the beneficiary to receive the property, still is deductible from the gross estate under the provisions of the Revenue Act of 1916 because it is collectible from the executor and representatives of the estate. But this is a method of collection that is not necessarily conclusive. Its purpose is to minimize the opportunity for avoidance of the pay-

ment of the tax. See *Keith* v. *Johnson*, 271 U. S. 1, 7. It does not render the tax a charge against the estate.

III

THE ISSUE IN RESPECT OF THE MASSACHUSETTS INHERITANCE TAX WAS PROPERLY BEFORE THE COURT BELOW

In spite of the fact that he urged a review by this Court of the decision of the Circuit Court of Appeals on the ground that the question decided by that court involved the construction of "a Federal law * * * which, as a matter of public concern, should be conclusively settled by this Court" (Pet. 10), the petitioner relies upon a technical objection to prevent a determination of that same issue. His position in substance is that the question of the deductibility of the state succession tax was not ruled upon by the District Court and that in consequence it was not properly before the Circuit Court of Appeals.

The record indicates the contrary. The petitioner's amended declaration alleged a failure by respondent to allow the deduction of the Massachusetts tax. (R. 15.) In addition to a general denial the answer to this pleading asserted the petitioner's failure to present the claim in proper season. (R. 19.) The facts in respect of the point were agreed upon and submitted to the court. (R. 23.) Findings and ruling were requested by both parties covering the issue (R. 55, 56, 57, 61) and were adopted by the court (R. 65). In its opin-

ion the court recited the facts (R. 149), and thereupon specifically held that "the Massachusetts legacy and succession tax * * * was legally deductible" (R. 156). The respondent assigned error on the point. (R. 159, 160.)

Upon these facts we submit that the petitioner's contention is unsound. The District Court passed upon the question on its merits. This point was the sole basis for the petitioner's recovery. (R. 156.) An appeal to the Circuit Court of Appeals reviews final decisions of the District Court and is not limited to the defenses urged in the court below. Judicial Code, Sec. 128, as amended (U. S. C., Title 28, Sec. 225); Judicial Code, Sec. 269, as amended (U. S. C., Title 28, Sec. 391). It is significant, too, that in his brief before the Circuit Court of Appeals the petitioner framed the third issue in these words (Br. below p. 16):

> Did the Court err in holding that the "Massachusetts inheritance tax" was a proper deduction under Section 203 of the Act?

Petitioner's brief did not urge that the issue was not properly before the appellate court.

In any event the Circuit Court of Appeals did consider and decide the question. This we submit it had a right to do. *United States* v. *Williams,* 278 U. S. 255, 256; *Dobbins* v. *Commissioner,* 31 F. (2d) 935, 937 (C. C. A. 3d). Furthermore, the petitioner can not recover unless this question is decided in his favor.

CONCLUSION

For these reasons it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY, 1932.

APPENDIX A

FEDERAL STATUTES

Section 203 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 778 provides in part:

> SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; * * *.

The Revenue Act of 1924, c. 234, 43 Stat. 253, 342, 343, provides in part:

> SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:
>
> "SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without author-

ity, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

(U. S. C., Title 26, Sec. 157.)

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the

Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act. (U. S. C., Title 26, Sec. 156.)

The Revenue Act of 1926, c. 27, 44 Stat. 9, 115, provides in part:

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from

allowance by the period of limitation then in existence, shall not be allowed."

(U. S. C., Supp. V, Title 26, Sec. 157.)

Section 1113 of the 1926 Act (U. S. C. Sup. V, Title 26, Sec. 156) reenacted Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924, above quoted.

APPENDIX B

MASSACHUSETTS STATUTES

The Massachusetts statutes in force on November 9, 1918, the date of the decedent's death in the instant case, contained in effect the same provisions as those below quoted from the General Laws of 1921. See part IV of c. 490 of the Acts of 1909 and c. 268 of the Acts of 1916.

General Laws of Massachusetts (1921), Vol. 1, Chapter 65 (pp. 666, 669):

TAXATION OF LEGACIES AND SUCCESSIONS

SECTION 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the state treasurer by the executors, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled.

SECTION 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax.

SECTION 18. If a legacy subject to said tax is charged upon or payable out of real estate, the heir or devisee, before paying said legacy, shall deduct said tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien upon said real estate until it is paid. Payment thereof may be enforced by the executor, administrator or trustee in the same manner as the payment of the legacy itself could be enforced.

APPENDIX C

REGULATIONS

Treasury Regulations 68 (1924 ed.), relating to Estate Tax under the Revenue Act of 1924 provides in part:

> ART. 99. *Claim for refund.*—A claim may be filed for refund of any tax, interest, or penalty, alleged to be excessive or illegal, where the payment thereof has been made either upon the basis of the return or as a result of the audit and review thereof. Claims for refund must be presented to the Commissioner within four years next after payment of the amount sought to be refunded. Such claim must be made on Form 843. As in the case of a claim for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1932

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor,
Plaintiff, Defendant in Error, Petitioner,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue,
Defendant, Plaintiff in Error, Respondent.

MOTION OF THE ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF THE ALLOWANCE OF PETITION FOR CERTIORARI.

By: JOSEPH E. WARNER,
Attorney General for Massachusetts.
State House, Boston, Massachusetts.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,

v.

MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

MOTION OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes Joseph E. Warner, Attorney General for the Commonwealth of Massachusetts, as *amicus curiae*, and, on behalf of the Commonwealth of Massachusetts, moves that leave be granted to file the brief submitted herewith, in support of the allowance of the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, as prayed for in the case of *Leach, Executor*, v. *Nichols, Collector*, reported in 50 Fed. (2) 787, the petition for certiorari being docket No. 468, October Term, 1931.

BRIEF IN SUPPORT OF ALLOWANCE OF PETITION FOR CERTIORARI.

STATEMENT.

The essential question raised in the case at bar is whether or not the tax imposed upon the estates of deceased persons by General Laws of Massachusetts, Chapter 65, is a "claim" or "charge" against the estate or an "administration expense" under Section 203 of the Federal Revenue Act of September 8, 1916, as amended (39 Stat. 777, c. 463; Comp. Stat. 1918, Sec. 6336½d).

Obviously the decision of the question of whether or not the Massachusetts tax is a "charge" against the estate under the Federal Statute must necessarily require an interpretation of the Massachusetts statute, the exact meaning or effect of which is not free from doubt and perplexity.

STATUTE PRESENTED FOR INTERPRETATION.

General Laws of Massachusetts, Chapter 65:

"SUBJECTS AND RATES OF TAXATION."

"Section 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

. . . . . .

"Section 6. Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for the taxes imposed by this chapter, with interest, until the same have been paid.

"Section 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the state treasurer by the executors, administrators or trustees at the

expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subject to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, shall be charged with a lien for all taxes and interest thereon which are or may become due on such property: . . ."

The interpretation which the Circuit Court of Appeals for the First Circuit has given the Massachusetts Statute, in the case at bar, is in *direct conflict* with the interpretation put upon that same statute by the United States Court of Claims as well as by two decisions of the United States District Court for the District of Massachusetts.

THE QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

First: Is the tax which the Massachusetts Statute imposes, a tax upon "the passing" or "the transfer" of the property of the estate as the taxable entity; or,

Second: Is the tax which the Massachusetts Statute imposes, a tax upon "the succession", "the receipt" or "the right" to each individual legacy or distributive share as an entirely separate and distinct taxable entity?

Precisely the same kind of questions arose in the case of *Knowlton* v. *Moore*, 178 U. S. 41; 20 S. Ct. 747, which involved the interpretation of the war revenue act of June, 1898 (30 Stat. c. 448, secs. 29–30). In that case this Court held that the Statute imposed the tax on the "particular legacies or distribu-

tive shares and not on the whole personal estate", but in the course of an able and exhaustive opinion Mr. Chief Justice White said:

> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them . . . that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, . . . the following appears: Although different modes of assessing such duties prevail and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

As to the interpretation of the Massachusetts Statute, *supra*, most of the cases in the Federal Courts have arisen under the same Federal Statute as is involved in the case at bar. (Section 203, Revenue Act of September 8, 1916, as amended; 39 Stat. 777, c. 463; Comp. Stat. 1918, Section 6336½d). Some of the Federal decisions have held that the Massachusetts tax is a "charge" or "claim" against the estate, or, in other words, that the tax imposed by the Massachusetts Statute is a tax upon the estate as a whole, whereas in the case at bar it was held that the Massachusetts tax is not a "charge" or "claim" against the estate but is a tax upon each separate legacy or distributive share. Each of these opinions of the Federal Courts cites Massachusetts cases and quotes language of the Supreme Judicial Court of Massachusetts which, if standing alone, seems to sustain its holdings and it is submitted that this fact is the best proof that the attention of this Court has never been drawn to the precise point now at issue.

ARGUMENT.

I.

BOTH THE FEDERAL DISTRICT COURT FOR MASSACHUSETTS AND THE UNITED STATES COURT OF CLAIMS HAVE HELD THAT THE MASSACHUSETTS STATUTE IMPOSES THE TAX UPON "THE TRANSFER OF THE ENTIRE ESTATE", AND NOT UPON "THE RECEIPT OF THE INDIVIDUAL LEGACIES OR DISTRIBUTIVE SHARES".

Two decisions of the United States District Court for the District of Massachusetts, by different judges, have held that the tax imposed by the Massachusetts statute is a "charge against the estate" as distinguished from a "legacy" or succession tax. The United States Court of Claims has consistently held likewise.

Thayer v. *Malley*, 3 Fed. (2) 194 (D. C. Mass., Morton, J.);

Leach v. *Nichols*, 43 Fed. (2) 918 (D. C. Mass., Brewster, J.);

Merrill v. *United States*, 66 Ct. Cls. 136.

In the case of *Thayer* v. *Malley*, *supra*, the Court said:

"It is contended by the government that there is a distinction between 'estate' taxes and 'legacy' taxes—the former being a tax upon the privilege of transmitting property by will or descent, and latter upon the privilege of receiving it; that 'estate' taxes are deductible, because levied against the estate itself, but that 'legacy' taxes are not deductible, because levied against the legatee; and that the Massachusetts tax is a legacy tax. The Massachusetts statute (G. L. c. 65, § 1) provides that 'all property . . . which shall pass by will . . . shall be subject to a tax', and then imposes taxes varying in amount with the relationship of the beneficiary to the decedent and with the amount of the legacy or distributive share. It makes the administrator or executor personally liable for the taxes which are paid by him and allowed in his account in the probate court. The New York statute (Transfer Tax Law

(Consol. Laws, c. 60) § 220) is similar. Under it, it has been held that a legacy to the United States was taxable because 'the tax is imposed upon the legacy before it reaches the hands of the government' (*U. S.* v. *Perkins*, 163 U. S. 625, at page 630, 16 S. Ct. 1073, at page 1075, 41 L. Ed. 287), and the precise question here presented has very recently been decided in that state in favor of the plaintiff's contention (*Sayre* v. *Brewster* (D. C.) 268 F. 553). The same conclusion has also been reached under the Pennsylvania statute, which is somewhat different. *Lederer, Collector*, v. *Northern Trust Co.* (C. C. A.) 262 F. 52.

It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz. that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the Federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d. The Massachusetts tax ought therefore to have been deducted before the tax on Bayard Thayer's estate was computed."

In the case of *Leach* v. *Nichols, supra*, the Court did not refer specifically to any of the Federal or Massachusetts cases but the language of the opinion leaves no doubt that the tax imposed by the Massachusetts Statute is a "charge against the estate" as distinguished from a "legacy" or "succession" tax, the Court said:

> "It is obvious that the United States has demanded and received a tax levied upon the estate of the plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court."

In the case of *Merrill et al.* v. *United States, supra*, the United States Circuit Court of Claims calls attention to the decisions

of the Supreme Judicial Court of Massachusetts involving the interpretation of the Massachusetts Statute, and says:

> "It is contended by the government that the Massachusetts inheritance tax is imposed upon the privilege of the legatee or distributee to receive property, and that it is therefore not a charge against the estate within the meaning of the statute. The prime question is not whether the tax under discussion is a tax upon the right to transmit property or upon the right to receive property. It is simply whether or not this tax is such a charge as falls within the term 'such other charges against the estate, as allowed by the laws of the jurisdiction under which the estate is being administered'."

Section 1 of the Massachusetts Act provides that:

> "Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for such taxes until the same have been paid. . . ."
>
> "It is further provided by section 4 that such taxes 'shall be payable to the treasurer and receiver general by the executors, administrators or trustees. . . .' All property subject to such taxes was, by the terms of the statute, charged with a lien to secure the payment of same. In the present case the administrators were notified by the proper officer of the commonwealth of Massachusetts that the tax 'became due and payable by *you* to the treasurer and receiver general, . . .' and the administrators paid said tax out of the property of the estate before distribution. Decisions of the Supreme Judicial Court of Massachusetts are cited by both plaintiffs and defendant in support of their respective contentions. Plaintiffs call attention to the decision in the case of *Hollis* v. *Treasurer and Receiver General*, 242 Mass. 163, in which the court referred to the inheritance taxes as 'a pecuniary burden laid for the support of the Government upon the privilege of *transmitting* or *receiving* property by will or by intestate succession.' (Italics ours.) In *Pratt* v. *Dean*, 246 Mass. 300, it is said:

'The tax is imposed not upon the property but upon the right to receive property, by reason of the death of the testator or donor. It is not a property tax, but an excise tax upon the transmission of property.'

"In the case of *Bingham* v. *Commissioner of Corporations and Taxation*, 249 Mass. 79, the court used this language:

'The Commonwealth received by way of succession and legacy taxes under G. L. c. 65, a *contribution from the estate of the decedent*. . . .' (Italics ours.)

"It appears from the decisions cited that the Massachusetts courts have consistently held that the inheritance tax is a tax both upon the right to transmit property and upon the right to receive property. The decision in the District Court of Massachusetts, in the case of *Thayer* v. *Malley*, 3 Fed. (2d) 194, in which was involved the identical question presented here, sustains plaintiffs' contention."

In addition to what is stated above, the opinion in the case of *Pratt* v. *Dean*, 246 Mass. 300, at page 309, contains the following comment by way of direct interpretation of General Laws of Massachusetts, Chapter 65:

"The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor on his death, whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words.

"This conclusion is reached by interpretation of the tax statute and with full realization of the general principle that tax laws are to be strictly construed, that the right to tax is not to be extended by implication, and that doubts

are to be resolved in favor of the taxpayer. *Eaton, Crane & Pike Co.* v. *Commonwealth*, 237 Mass. 523, 530, and cases there collected."

II.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HOLDS THAT THE TAX IMPOSED BY THE MASSACHUSETTS STATUTE IS A TAX UPON "THE RIGHT TO RECEIVE PROPERTY".

In direct conflict with the two decisions of the Massachusetts District Court and that of the Court of Claims referred to above, the Circuit Court of Appeals for the First Circuit, in the case at bar, holds that the Massachusetts tax "is an excise tax on the right to receive property" and in its opinion (50 Fed. (2) p. 790) states:

> "The nature of the Massachusetts tax has been definitely settled, see *Attorney General* v. *Stone*, 209 Mass. 186, 95 N. E. 395; *Boston Safe Dep. & Tr. Co.* v. *Com'r of Corporations and Taxation*, 267 Mass. 240, 166 N. E. 729, 730, which construction was adopted by the United States Supreme Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565, and many other Massachusetts cases, viz. that it is an excise tax on the right to receive property by will, inheritance, or gift, is assessed on the value of the legacy or gift or amount received by the legatee, distributee, or donee, and is ultimately payable by the recipient. G. L. Mass. 1921, c. 65, §§ 17-21."

This decision of the Circuit Court of Appeals appears to be the only instance in which any Court has held that the tax imposed under the Massachusetts Statute is not a proper deduction by the estate for the purpose of the Federal tax and the opinion contains no reference to the reasoning contained in the opinions of the District Court of Massachusetts, in that of the Court of Claims or of the other decisions of the Supreme Judicial Court of Massachusetts which contain language of the same tenor and purport as that contained in the opinion in the case of *Pratt* v. *Dean*, 246 Mass. 300, above referred to.

Both the opinion by the Circuit Court of Appeals in the case at bar and that of the United States Court of Claims in the case

of *Merrill et al.* v. *United States*, 66 Ct. Cls. 136, above cited contain references to two decisions of this Court involving the New York statute which imposes a tax upon the estates of deceased persons, and both opinions seem to be in agreement in holding that the New York statute has the same meaning and effect as the Massachusetts statute.

Keith v. *Johnson*, 271 U. S. 1; 46 S. Ct. 415;
New York Trust Co. v. *Eisner*, 256 U. S. 345, 41 S. Ct. 506.

In the case of *Merrill et al* v. *United States, supra*, the Court of Claims said:

> "The attention of the court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the Thayer *v.* Malley Case on that point, but it should also be noted that the later case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in the Eisner Case on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the court held that the inheritance tax was deductible, citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the Thayer-Malley Case."

Without specifically referring to the above comments of the Court of Claims, the opinion of the Circuit Court of Appeals in the case at bar (50 Fed. (2) 787 at p. 791), says:

> "The ruling in the *Keith case* did not reverse the ruling in the *Eisner case*. It merely followed the last construction of the New York Statute by the local Courts."

III.

THE UNCERTAINTY AS TO THE MEANING AND EFFECT OF THE FEDERAL STATUTE WHEN APPLIED TO THE MASSACHUSETTS STATUTE, AS INTERPRETED BY THE FEDERAL COURTS, HAS RESULTED IN GREAT CONFUSION AND INEQUALITIES IN THE AMOUNTS OF TAXES EXACTED FROM DIFFERENT MASSACHUSETTS ESTATES ALL IN EXACTLY THE SAME POSITION.

In this connection we respectfully call to the attention of this Court the situation referred to by Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley, supra*, where he said:

> "It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz., that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d."

The States which have statutes which seem to be in all essential respects similar to General Laws of Massachusetts, Chapter 65, and where the Federal courts have held that the estates of decedents were entitled to the benefit of the deduction of the State tax are as follows:

New York—Keith v. *Johnson*, 271 U. S. 1, 46 S. Ct. 415.
Texas—United States v. *Mitchell*, 271 U. S. 9; 46 S. Ct. 418.
Pennsylvania—Lederer v. *Northern Tr. Co.*, 262 Fed. 52; certiorari denied, 253 U. S. 487; 40 S. Ct. 483.
Maryland—Miles v. *Curley*, 291 Fed. 761, certiorari not applied for.
Utah—Kearns v. *Dunbar*, 292 Fed. 1013; no appeal taken.

California—Kombst et al. v. *United States*, Ct. Cls. (unreported, decided November 2, 1931).

The latest decision involving the interpretation of a State Statute was that of the Court of Claims in *Kombst et al.* v. *United States, supra.* In that opinion the Court said:

"The next question which confronts us is whether the inheritance tax paid to the State of California is a charge against the estate, or against those who succeed to the estate. A similar question has been before the Supreme Court on several occasions involving the construction of the inheritance tax statutes of the State of New York (*United States* v. *Mitchell*, 271 U. S. 9) and of the State of Texas (*Keith, Collector*, v. *Johnson, Administrator*, 271 U. S. 1). This court has had a case involving the construction of the inheritance tax statute of the State of Massachusetts (*Merrill* v. *United States*, 66 Ct. Cls. 136). In all of these cases it has been held that the tax is a charge against the estate, and therefore deductible in the estate tax return made to the Federal Goyernment. We have carefully compared the statute of the State of California with the statutes of the other States involved in those cases. We can find no substantial differences. The value of the estate was fixed as of the time of the death of the testator; the tax is due and payable at the death of the decedent; the executors are made responsible for the payment of the tax; it must be paid in eighteen months, otherwise bond has to be given by the executors; no payment can be made to any heir or legatee until a receipt has been filed in court showing the payment of the tax, and other provisions are almost identical with the statutes of the States we have mentioned before. The decisions of the courts of California as to whether this is a transfer or a succession tax are somewhat clouded. In one case, they determine it a transfer tax (*Estate of Potter*, 188 Cal. 55); in another, a succession tax, and in a third, a transfer and succession tax (*Estate of Letchworth*, 201 Cal. 1); but all of the cases are uniform in holding that the amount of the tax is based on the value of the estate at the time of the death of the testator and

that the impairment of the estate by the executors does not reduce the amount of the tax which must be paid on the gross value of the estate at the time of death. (*Estate of Hite*, 159 Cal. 393.) We can see no difference between this statute and that held in the case of *United States* v. *Mitchell* (*supra*); the case of *Keith, Collector*, v. *Johnson, Administrator* (*supra*); and the case decided by this court, *Merrill* v. *United States* (*supra*). We are therefore of the opinion that the amount paid from the estate of Rosa von Zimmermann to the State of California was a charge against the estate and was deductible from the estate tax paid to the Federal Government and the refund claim should have been allowed by the Commissioner of Internal Revenue."

It should also be pointed out, that it would be equally unjust and result in discrimination as between estates within the Commonwealth of Massachusetts if those which resorted to the United States Court of Claims, as in the case of *Merrill et al.* v. *United States*, *supra*, should be granted the benefits of deducting the Massachusetts tax, whereas other similar estates, which were required to pay the Massachusetts tax, should be denied the deduction on the authority of the decision of the Circuit Court of Appeals for the First Circuit in the case at bar.

IV.

AN AUTHORITATIVE INTERPRETATION BY THIS COURT OF THE FEDERAL STATUTE AS APPLIED TO THE MASSACHUSETTS TAX WILL BE OF GREAT PUBLIC INTEREST AND VALUE.

It is clear, from all that has been stated above, that an authoritative interpretation of the Federal Statute as applied to the Massachusetts tax will be of great public interest and value. Obviously, such an interpretation by this Court will settle the conflict of opinion which now exists between the United States Court of Claims and the Federal District Court of Massachusetts on the one hand, and the United States Circuit Court of Appeals for the First Circuit on the other.

Although the Federal Revenue Act of 1916 has been super-

seded by later acts and most of the estates, subject to tax under that act and under Massachusetts General Laws, c. 65, have been settled, an interpretation of the Massachusetts statute, in the case at bar, will result in uniformity and equality of treatment under the Federal statutes of such estates, now unsettled, as were required to pay taxes both under the Federal Revenue Act of September 8, 1916, and under General Laws of Massachusetts, c. 65, and will serve as a useful authority and guide in the settlement of controversies and avoidance of litigation as might arise in the application of this Massachusetts statute when involved in Federal taxation.

CONCLUSION.

WHEREFORE, on behalf of the Commonwealth of Massachusetts it is respectfully submitted that the Petition for Certiorari in the case at bar should be granted to the end that this Court may interpret and definitely settle the meaning of chapter 65 of the General Laws of Massachusetts and the "nature" and incidence of the tax imposed thereby.

Respectfully submitted,

JOSEPH E. WARNER,

Attorney General,

for the Commonwealth of Massachusetts.

CERTIFICATION.

I, Joseph E. Warner, Attorney General for the Commonwealth of Massachusetts, certify that the within Motion that the Petition for Certiorari be granted and Brief in support thereof, are filed solely on the grounds of public interest and concern to the officials and citizens of the Commonwealth of Massachusetts; that said Motion and Brief are not filed primarily in the interests of either of the parties involved in the case at bar; that said Motion and Brief are filed to the end that this Court may interpret Chapter 65 of the General Laws of Massachusetts and thereby conclusively settle the great conflict of opinion which exists as to the "nature" and incidence of the tax imposed under the said Massachusetts statute; and that such an interpretation of the Massachusetts Statute by this Court will be of great value to the officials, to executors, to members of the bar, and to the citizens at large of the Commonwealth of Massachusetts.

JOSEPH E. WARNER,
Attorney General,
for the Commonwealth of Massachusetts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor, *Petitioner*,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF.

CLARENCE W. DEKNIGHT,
601 Hibbs Building,
Washington, D. C.

FREDERICK SCHWERTNER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor, *Petitioner*,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

Motion of Clarence W. DeKnight, a Member of the Bar of this Court, for Leave to File Brief as Amicus Curiae.

Now comes Clarence W. DeKnight, a member of the bar of this Court, as amicus curiae, and moves that leave be granted to file the brief submitted herewith, in the case of *Leach, Executor, v. Nichols, Collector,* reported in 50 F. (2d) 787, certiorari granted December 7, 1931.

The issue raised in the case at bar as to the deductibility of the Massachusetts inheritance tax from the value of the gross estate in arriving at the net estate subject to the Federal estate tax under the Revenue Act of 1916, as amended, is similar to an

issue presented in the case of *Barnim Kombst, et al., v. United States,* decided by the Court of Claims on November 2, 1931, and in which the Government will file an application for a writ of certiorari. In *United States v. Barnim Kombst, et al., supra,* the Court of Claims held that the California inheritance tax was deductible for Federal estate tax purposes under the Revenue Act of 1916, as amended, while in *Leach v. Nichols, supra,* it was held that the Massachusetts inheritance tax was not deductible. The said Clarence W. DeKnight appears as counsel for the plaintiffs in *Barnim Kombst, et al., v. United States.* The decision of this Court in *Leach v. Nichols* will affect and may be decisive of an issue presented in *Barnim Kombst, et al., v. United States.*

Wherefore, said Clarence W. DeKnight prays that he may have leave to file a brief as amicus curiae, a copy of which is herewith presented.

CLARENCE W. DEKNIGHT,
A Member of the Bar of this Court.

Dated at Washington, D. C., January 30, 1932.

To Counsel for Petitioner and Respondent:

GENTLEMEN:

Take notice that on Monday, February 15, 1932, I will submit the foregoing motion to the Supreme Court of the United States.

CLARENCE W. DEKNIGHT,
601 Hibbs Building,
Washington, D. C.

February 1, 1932.

SERVICE OF MOTION AND NOTICE.

A copy of said motion and notice have been served on counsel for petitioner and respondent.

CLARENCE W. DEKNIGHT.

Washington, D. C., February 15, 1932.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor, *Petitioner*,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue.

BRIEF AS AMICUS CURIAE.

The decision of the Circuit Court of Appeals, First Circuit, in *Nichols v. Leach*, 50 F. (2d) 787, holding that the Massachusetts inheritance tax is not deductible as a charge against the estate under Section 203 (a) (1) of the Revenue Act of 1916 in arriving at the value of the net estate subject to the Federal estate tax, is in direct conflict with the decision of the Court of Claims in *Merrill, et al., v. United States*, 66 Ct. Cls. 136, holding that the Massachusetts inheritance tax is deductible under that act, and also does violence to the decisions of this Court in *Keith v. Johnson*, 271 U. S. 1, and *United States v Mitchell*, 271 U. S. 9,

holding respectively that the New York transfer tax and the Texas inheritance tax are deductible items under the Revenue Act of 1916.

It is evident that this Court in *Keith v. Johnson* and *United States v. Mitchell, supra,* gave the subject of the deductibility of State inheritance taxes under the Revenue Act of 1916 the most careful and deliberate thought, and no reason exists at the present time for the Court to depart from the judicial pronouncements contained therein.

The decisions of the various State courts describing the inheritance tax are not very helpful in determining whether the tax is a charge against the estate, unless they specifically decide this question. The terms of the inheritance tax act should be examined to determine whether the tax is a charge against the estate.

As was well said by the late Judge Moss in *Merrill, et al., v. United States, supra*:

> "The primary question is not whether the tax under discussion is a tax upon the right to transmit property or upon the right to receive property. It is simply whether or not this tax is such a charge as falls within the term 'such other charges against the estate, as are allowed by the laws of the jurisdiction under which the estate is being administered'."

In *Lederer v. Northern Trust Co., et al.,* 262 Fed. 52, certiorari denied, 253 U. S. 487, allowing the deduction of the Pennsylvania inheritance tax under the Revenue Act of 1916, it is stated:

> "* * * But in looking for the nature of the collateral inheritance tax under consideration, it

is not necessary to seek light from statutes and decisions of other states, for the act shows its nature by its own clear expressions aided by interpretations repeatedly made by the Supreme Court of Pennsylvania.

"The act provides that 'all estates * * * shall be subject' to the tax; that executors and administrators shall pay the tax; that until they pay it they shall not be discharged; that the Auditor General's receipt for its payment shall be a proper voucher in the settlement of the estate; and that in stating an account in the Orphans' Court the tax shall be allowed and deducted before a balance for distribution is struck."

There is no question but that a decision of a State court deciding whether or not a certain inheritance tax is a charge against an estate is entitled to great weight. But when a State court upholds the constitutionality of an inheritance tax act by stating that the tax is one on the right to transmit property, or on the right to receive property, or on both the right to transmit and receive property, such a decision affords little light in the judicial determination of whether the tax is a charge against the estate. The State reports are replete with decisions containing expressions descriptive of inheritance taxes, but such decisions are worthless unless the cases involved a controversy as to whether the tax is a charge against the estate, or involved a question closely approaching such an issue.

It is apparent that the Circuit Court of Appeals in *Nichols v. Leach, supra,* largely relied upon the decision of the Court of Appeals of New York in the *Matter of Oakes,* 248 N. Y. 280, in reaching the conclusion that it did, but in view of the facts in that

case, its conclusion was wholly unwarranted and the case is not authority for the issue involved in the case at bar. The *Matter of Oakes, supra*, involved the issue as to whether the estate or the donee was liable for the Federal estate tax on certain shares or stock. Francis J. Oakes, the owner of 1,510 shares of stock of the Oakes Manufacturing Company, made delivery of his certificates to be held in escrow for the benefit of his son. Delivery was accompanied by a writing which described the conditions of the escrow as follows:

> "I, Francis J. Oakes, hereby deliver irrevocably the certificates of stock of the Oakes Manufacturing Company, owned by me for 1,510 shares of the stock of said company, to John D. Kernan and Archibald R. Watson in escrow, to be delivered by them or the survivor of them upon my death to my son Francis J. Oakes, Jr., subject to all state and national taxes thereon being paid, and said Kernan and Watson, or the survivor of them, being fully indemnified and protected against the same."

The clause as to the taxes was inserted in the escrow upon the suggestion of one of the trustees that without it they might become involved in personal liability.

Upon the death of Oakes, Sr., the executor, Francis J. Oakes, Jr., paid out of his own moneys the tax assessed upon the transfer of the shares under the statutes of New York.

As was stated by Chief Justice Cardozo:

> "The question to be determined here is the incidence of the Federal tax as between the donee of the shares, who was also the executor, upon

the one hand, and the legatees of the residuary estate, upon the other. There can be no doubt that the executor was justified in discharging the tax out of the residue unless the incidence of the burden has been changed by the conditions of the escrow. The surrogate (disapproving the report of a referee to the contrary) and the Appellate Division found that such a change had been wrought, and that the donee by the acceptance of the gift had assumed by implication the payment of the tax in exoneration of the residue. We hold a different view."

The Court held that by the acceptance of the shares of stock the donee did not thereby assume the payment of the Federal estate taxes thereon, and that the conditions stated in the escrow agreement were not obligations laid on the donee, but were conditions of the escrow imposed on the trustees.

It is a far cry to say that this decision changes the complexion of the New York transfer tax, and will now enable this Court to depart from the rule announced in *Keith v. Johnson* and *United States v. Mitchell, supra.*

The decision in the *Matter of Oakes, supra,* does not purport to overrule *Home Trust Co. v. Law,* 204 App. Div. 590, 198 N. Y. Supp. 710, which is an authority directly in point, and *Re Hubbard,* 234 N. Y. 179, 137 N. E. 17, which were dealt with at length and relied upon by this Court in *Keith v. Johnson, supra.*

In *Keith v. Johnson, supra,* in considering the case of *Home Trust Co. v. Law, supra,* which is an authority entitled to great weight, Mr. Justice Butler, who delivered the opinion of the Court, said:

"By indicating that the latest decisions of the State courts will be followed here as binding, it is

> not intended to intimate that a different view is entertained as to the construction properly to be given the state law. *In fact we agree with that construction;* and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a state where there has been no authoritative construction by the state courts. * * *." (Italics ours.)

In *United States v. Mitchell,* 271 U. S. 9, decided concurrently with *Keith v. Johnson, supra,* holding the Texas inheritance tax deductible under the Revenue Act of 1916, it is stated:

> "We are of the opinion that, in respect of the matter under consideration, the Texas inheritance tax law cannot be distinguished from the new York transfer tax law. * * *."

This decision paved the way for uniform decisions on the question involved where the State inheritance tax acts are substantially the same.

The Court of Claims in *Barnim Kombst, et al., v. United States, supra,* stated that they could see no difference between the California inheritance tax act and those involved in *Keith v. Johnson, supra, United States v. Mitchell, supra,* and *Merrill v. United States, supra.* The Courts of California have described the inheritance tax by various terms. The latest expression of the Supreme Court of California is contained in *Estate of Letchworth,* 201 Cal. 1, decided April 2, 1927, wherein it was said "the tax imposed by the inheritance tax statute is on the transfer of the property or on the right to succeed to the property rather than on the property itself."

Under the law of California the tax is not measured by the value of the property which the person actually receives. It becomes fixed as of the date of death and a certain portion of the property is contributed to the State. It was so held in the *Estate of Hite,* 159 Cal. 392, which is an authority entitled to weight. This case involved an appeal from an order fixing the amount of inheritance tax due under the Inheritance Tax Act (Stats. 1905, p, 341) from the various beneficiaries under the will of deceased. The appeal was by the residuary legatees and by the administrator with the will annexed. The lower court in fixing the amount of inheritance tax included in the valuation of the estate upon which the tax should be computed the sum of $98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which had been appropriated to his own use within a year of his appointment by the executor of the will of deceased. The whole of said sum of $98,991.10 was lost to the estate as the executor was without bond. The sole question in the case was whether the lower court's action in including the sum of $98,991.10 in the estate subject to tax was correct. The Court held that the amount was properly included. The Court, in the course of its opinion, said:

> "The exact question thus presented has apparently never before arisen in this or any other state. * * *
>
> "* * * We can perceive no warrant in the Inheritance Tax Act for holding that the destruction or loss of a part of the property before the actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than

would a material depreciation in its value affect it. * * * The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time. * * *

"We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the $98,491.10 is concerned from the other property in its hands which constitutes part of the residuum of the estate and belongs under the provisions of the will to the residuary legatees. The residuary legatees are bound to pay as a condition to receiving possession of the resdue of the estate, a succession tax determined on the basis hereinbefore stated, and the administrator is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will."

This decision demonstrates that under the law of California the inheritance tax is not one on a legatee on the value of property which he actually and physically receives on distribution, but one which attaches at the instant of death of the decedent, and is based on the value of the property at that time. The case actually decides that the tax is a charge against the estate, because if the executor had absconded with all the decedent's property excepting enough to pay the inheritance tax no different rule would apply.

In *Barnim Kombst, et al., v. United States, supra,* the decedent's heirs and residuary legatees were German alien enemies resident in Germany. The decedent was an alien enemy resident in California, and she died on April 25, 1917. All the right, title and interest of the alien enemy heirs in and to the estate was seized by the Alien Property Custodian on April 18, 1918. The California inheritance tax was paid by the executors of the estate based on the entire net value of the estate at the time of the death of the decedent.

In conclusion, it is respectfully submitted that no reason exists why this Court in *Leach v. Nichols* should depart from the rule heretofore announced in *Keith v. Johnson, supra,* and *United States v. Mitchell, supra.*

Respectfully submitted,

CLARENCE W. DEKNIGHT,
601 Hibbs Building,
Washington, D. C.

FREDERICK SCHWERTNER,
Of Counsel.

Washington, D. C., February 15, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 468.—October Term, 1931.

Robert M. Leach, Executor, Etc., Petitioner,
vs.
Malcolm E. Nichols, Formerly Collector of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 14, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

William E. Walker of Taunton, Massachusetts, died testate November 9, 1918. Petitioner, as executor of the estate, paid the taxes imposed by the State in respect of the property which passed from the decedent. He also paid to respondent the Federal estate taxes prescribed by the Revenue Act 1916, 39 Stat. 756, 778, which the Commissioner reckoned without deducting from the gross estate the taxes exacted by the State. The Circuit Court of Appeals denied his right to recover the alleged overpayment—the difference between the sum demanded and what would have been due if the claimed deduction had been allowed. The District Court had held otherwise.

Here the insistence is that to ascertain the net estate under Section 203, Revenue Act September 8, 1916, it was necessary to deduct from the gross estate the tax paid to Massachusetts as required by Chap. 65 of her General Laws. Also, that in the circumstances the Circuit Court of Appeals should not have decided this question of law.

The record shows that the court below properly considered and ruled upon the point of law. The District Court—where the cause was tried without a jury—had said of the state tax "there can be no question that it was legally deductible." The amended declaration alleges that the Commissioner wrongfully refused to allow the deduction. The answer contains a general denial. The agreed statement of facts points out—"That in arriving at the value of the net estate upon which the said total tax was computed the Commissioner did not make any deduction or allowance

for the amount required to pay the Massachusetts inheritance tax, which the estate was required to pay and did pay to the Commonwealth of Massachusetts." And the defendant asked the court to find as matter of law—"Plaintiff is not entitled to recover anything of the defendant and his declaration must be dismissed with judgment for the defendant for his costs." The trial court misconstrued the federal statute. With his petition for appeal from its judgment, the defendant presented, among others, the following assignment of error: The District Court erred in holding: "It is obvious that the United States had demanded and received a tax levied upon the estate of the plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court."

The Revenue Act of 1916 (amended as to rates March 3, 1917, 39 Stat. 1000, 1002, and October 3, 1917, 40 Stat. 300, 324) imposed a graduated tax upon the transfer of the net estate, ascertained as directed by Section 203, of every person dying thereafter.

> "Section 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a resident, by deducting from the value of the gross estate—
>
> "(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; . . . ."

The General Laws of Massachusetts (1921) Volume 1, Chap. 65, provide—

> "Section 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax at the percentage rates fixed by the following table: . . . .

"Section 6. Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for the taxes imposed by this chapter, with interest, until the same have been paid.

"Section 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the state treasurer by the executors, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; . . .

"Section 9. Property of which a decedent dies seized or possessed, subjected to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, shall be charged with a lien for all taxes and interest thereon which are or may become due on such property. . . .

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-nine, if they refuse or neglect to pay said tax."

Manifestly, the state taxes paid by the executor were not permissible deductions unless they were such "charges against the estate, as are allowed by the laws of the jurisdiction, . . . under which the estate is being administered." Charges against an estate are only such as affect it as a whole. They do not include taxes on the rights of individual beneficiaries. *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 350.

The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Payments required of an executor are only preliminary; ultimately they must be met by the beneficiaries.

Decisions of the Massachusetts Supreme Court show with adequate certainty that the right of succession is the real object of the charge laid because of property which passes by will or under the laws relative to intestacy. The thing burdened is the right to receive. *Attorney General* v. *Stone,* 209 Mass. 186, 190; *Magee* v. *Commissioner,* 256 Mass. 512; *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 267 Mass. 240; *Coolidge* v. *Commissioner,* 268 Mass. 443, 447. See *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

It is unnecessary for us to consider whether the petitioner filed a proper claim for refund within the period prescribed by the statute.

The challenged judgment is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.